MISSISSIPPI LAW JOURNAL

SYMPOSIUM

THE TOOLS TO INTERPRET THE FOURTH AMENDMENT

Sponsored by the National Center for Justice and the Rule of Law

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FOREWORD

The Tools to Interpret the Fourth Amendment

Thomas K. Clancy[*]

The National Center for Justice and the Rule of Law,[1] a program of the University of Mississippi School of Law, focuses on issues relating to the criminal justice system, with its purpose to promote the two concepts comprising the title of the Center. The concept of "justice" appeals to basic notions of equality, equity and fairness, often with an emotive component. In contrast, the phrase "rule of law" refers to the requirement that certain procedures and principles must be followed in each case to reach a correct result. Neither concept is sufficient; rather, both must be utilized to ensure that the criminal justice system fulfills its function in society. The Center implements its mission through projects, conferences, educational programs, and publications that examine important criminal law and procedure issues.

In furtherance of that mission, the Center has established the *Fourth Amendment Initiative*. Perhaps no other Amendment has such broad applicability to every day life as does the Fourth Amendment. The Fourth Amendment is also a very complicated area of jurisprudence and the legal landscape is

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[1] The National Center for Justice and the Rule of Law is supported by a grant from the Bureau of Justice Assistance, Office of Justice Programs, of the U.S. Department of Justice, grant No. 2000-DD-VX-0032. The Bureau of Justice Assistance is a component of the Office of Justice Programs, which includes the Bureau of Justice Statistics, the National Institute of Justice, the Office of Juvenile Justice and Delinquency Prevention, and the Office of Victims of Crime. Points of view or opinions in the articles stemming from this symposium are those of the author and do not represent the official position of the United States Department of Justice.

constantly changing as a result of new technology and court decisions. The purpose of the Center's initiative is to promote awareness of Fourth Amendment principles through conferences, publications, and training of professionals in the criminal justice system. The Center takes no point of view as to the direction that Fourth Amendment analysis should take but seeks to facilitate awareness of the issues and encourage discussion of search and seizure principles.

On April 2, 2004, the Center held its third annual conference, entitled: *The Tools to Interpret the Fourth Amendment.* Scholars presenting papers were Professor Ronald Bacigal, of the University of Richmond School of Law, Professor Donald Dripps, then at the University of Minnesota Law School and now at the University of San Diego School of Law, Professor Lewis Katz, of Case Western Reserve University School of Law, Professor Scott Sundby, of Washington & Lee University School of Law, and Professor Daniel Yeager, of California Western School of Law. In the audience that day were thirty-six state appellate judges from twenty-one states, whose presence at the symposium represented the third day of an appellate conference on Fourth Amendment principles sponsored by the Center in cooperation with the National Judicial College.

The Center believes that the conference—and the insightful articles published in this special edition of the *Mississippi Law Journal* that stemmed from the presentations at the conference—significantly further the Center's mission and, more importantly, make significant contributions to the understanding of Fourth Amendment principles. The Center, and I personally, wish to thank the leading legal scholars who participated in the symposium.

The symposium was designed to examine some of the methods that these distinguished scholars believe *should* be employed by the Supreme Court to provide a framework by which cases can be decided on a principled—or at least consistent—basis. This is a broad question and I want to take a few moments to explain why the question was so framed. "Tools" are devices, instruments, or methods that are used to help shape the content of the terms of the Fourth Amendment.

Just as a plow is a tool that helps prepare a field for planting, the Supreme Court uses tools to help it in its interpretative task of giving meaning to the various terms of the amendment.

The Court has used a variety of interpretative tools as aids in formulating principles to implement Fourth Amendment commands. Depending on the era and whether a conservative or liberal majority holds sway on the Court, different tools have been utilized. Looking at the cases collectively, they are irreconcilable as to which tools are proper. To take just a few examples of the Court's inconsistencies, longstanding practices,[2] including authorization by Congress[3]—particularly by the first Congress[4]—has sometimes influenced the Court's decisions but at other times has not.[5] Similarly, an historical

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[2] *See, e.g.*, Boyd v. United States, 116 U.S. 616, 622-23 (1886). The Court has often relied on the historical acceptance of the actions challenged to support its conclusion that they are reasonable. *See, e.g.*, United States v. Robinson, 414 U.S. 218, 230-35 (1973). *Cf.* Carroll v. United States, 267 U.S. 132, 149 (1925) ("The Fourth Amendment is to be construed in light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.").

[3] Indeed, the Court has gone so far as to say that, when Congress has authorized a particular type of search, there is a "strong presumption of constitutionality . . . especially when it turns on what is 'reasonable.'" United States v. Di Re, 332 U.S. 581, 585 (1948). *Accord* United States v. Watson, 423 U.S. 411, 416 (1976).

[4] *See, e.g., Boyd*, 116 U.S. at 623. *Cf.* Davis v. United States, 328 U.S. 582, 605-06 (1946) (Frankfurter, J., dissenting) (examining "contemporaneous" authorizations to search by the first Congress and by subsequent Congresses as demonstrating need for a warrant and illuminating intent to restrict ability to search unless authorized); *Carroll*, 267 U.S. at 151 (examining actions of the first, second, fourth, and subsequent Congresses as evidence of reasonableness).

[5] *See, e.g.*, Almeida-Sanchez v. United States, 413 U.S. 266, 272 (1973) ("It is clear, of course, that no Act of Congress can authorize a violation of the Constitution."). Mere historical acceptance has sometimes not been enough to make a practice reasonable. *See, e.g.*, Williams v. Illinois, 399 U.S. 235, 240 (1970) (stating the "need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution"). *See generally* Kathryn R. Urbonya, *Rhetorically Reasonable Police Practices: Viewing the Supreme Court's Multiple Discourse Paths*, 40 AM CRIM. L. REV. 1387, 1397-1417 (2003) (observing that the Court's use of history is one type of rhetorical argument that the Court has selectively used in its decisions).

analysis of the state of the common law at the time of the framing has been viewed as dispositive,[6] at other times as persuasive,[7] or occasionally rejected as a basis to interpret the Amendment.[8] In contrast, the Court at times has employed a nonhistorical analysis to interpret the commands of the Fourth Amendment, asserting that law enforcement practices are not "frozen" by those in place at the time the Fourth Amendment was adopted[9] and that the Amendment must be interpreted in light of contemporary norms and conditions.[10]

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[6] Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999) (creating a two-step model for measuring reasonableness: first, the Court inquires "whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed" and, second, if "that inquiry yields no answer," the search or seizure is evaluated "under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests"). *Cf. id.* at 307 (Breyer, J., concurring) ("I join the Court's opinion with the understanding that history is meant to inform, but not automatically to determine, the answer to a Fourth Amendment question."); *id.* at 311 n.3 (Stevens, J., dissenting) ("To my knowledge, we have never restricted ourselves to a two-step Fourth Amendment approach wherein the privacy and governmental interests at stake must be considered only if 18th-century common law 'yields no answer.'"). *See generally* Tracey Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. Rev. 895 (2002) (discussing *Houghton* and the Court's inconsistent and selective use of history).

[7] *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 326 (2001) (noting that Court is "guided" by common law in ascertaining meaning of reasonableness); Oliver v. United States, 466 U.S. 170, 183-84 (1984) (stating that while "[t]he common law may guide consideration of what areas are protected by the Fourth Amendment," common law rights are not co-incident with the Fourth Amendment.); Payton v. New York, 445 U.S. 573, 591 (1980) (utilizing common law view to shed light on Framers' intent); Gerstein v. Pugh, 420 U.S. 103, 114 (1974) (stating that the common law acts as a guide to interpret Fourth Amendment). *See also* David A. Sklansky, *The Fourth Amendment and the Common Law*, 100 COLUM. L. REV. 1739, 1764-66 (2000) (tracing Supreme Court treatment of the common law as an interpretative tool).

[8] *See, e.g.,* Tennessee v. Garner, 471 U.S. 1, 12-15 (1985) (changing the common law rule permitting police to shoot at fleeing suspects in part because modern felonies differ significantly from common law felonies and because of technological changes in weaponry).

[9] Steagald v. United States, 451 U.S. 204, 217 n.10 (1981); *Payton*, 445 U.S. at 591 n.33.

[10] *See Payton*, 445 U.S. at 600 (stating that "custom and contemporary norms necessarily play" a "large role" in assessing reasonableness); Steagald v. United

Inconsistently, it has also rejected contemporary needs as a tool.[11] The necessity for a workable rule for the police officer on the street to follow has been repeatedly emphasized by the Court.[12] Thus, the Supreme Court has sometimes utilized bright-line rules to guide the police in executing searches and seizures,[13] which do not require case-by-case justification and provide "clear legal boundaries to police conduct."[14] Yet, at other times, it has rejected such analysis, viewing bright lines as exceptional situations[15] and maintaining that the limitations imposed by the Fourth Amendment must "be developed in the concrete factual circumstances of individual cases."[16]

States, 451 U.S. at 217 n.10 ("Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper."); *Garner*, 471 U.S. at 12-15 (changing the common law rule that had permitted the police to shoot at fleeing suspects in part because modern felonies differ significantly from common law felonies and because of technological changes in weaponry).

[11] *See, e.g.*, Richards v. Wisconsin, 520 U.S. 385, 392 n.4 (1997) (cautioning that "[i]t is always somewhat dangerous to ground exceptions to constitutional protections in the social norms of a given historical moment[,]" given the Fourth Amendment's purpose of preserving that degree of privacy that was afforded at the time it was adopted).

[12] *See, e.g.*, Illinois v. Andreas, 463 U.S. 765, 772 (1983); New York v. Belton, 453 U.S. 454, 459-60 (1981) ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.").

[13] *See, e.g.*, Maryland v. Wilson, 519 U.S. 408 (1997) (permitting police officers to order all passengers to exit a vehicle as an incident of a stop of that vehicle); *Belton*, 453 U.S. at 458 ("'[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'") (quoting Dunaway v. New York, 442 U.S. 200, 213-14 (1979)).

[14] David A. Harris, *Frisking Every Suspect: The Withering of* Terry, 28 U.C. DAVIS L. REV. 1, 37 (1994). Such rules are premised on the recognition that the protections of the Fourth Amendment "'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'" *Belton*, 453 U.S. at 458 (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 S. CT. REV. 127, 142).

[15] *See, e.g.*, Ohio v. Robinette, 519 U.S. 33, 39 (1996).

[16] Terry v. Ohio, 392 U.S. 1, 29 (1968).

This is to say that we are often at a loss to predict how the Court will decide cases or at least what "tools" the Court will use to support its decision. This symposium will not end the debate on how the Amendment should be interpreted. Indeed, I suspect that some will even dispute what I mean by "tools" and characterize the methods and goals of the Supreme Court's interpretative function much differently. Nonetheless, the purpose of the symposium is to examine some of the methods that these distinguished scholars believe should be employed by the Court to provide a framework by which cases can be decided on a principled and consistent basis. While this conference will not end the debate, hopefully it will contribute insights to facilitate knowledge of Fourth Amendment principles.

MAKING THE RIGHT GAMBLE: THE ODDS ON PROBABLE CAUSE

Ronald J. Bacigal[*]

More so than any other provision of the Bill of Rights, the Fourth Amendment has always been a deadly serious gamble. How much of our collective security are we willing to risk in order to promote individual freedom?[1]

The framers of the amendment have given us one answer to this question[2]—intrusions upon liberty and privacy may take place when the government has probable cause that the search will uncover the sought-after goods or that the seized person committed a crime. Yet the Supreme Court has said very little about computing the odds—the degree of certainty—that determines when probable cause exists. The

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[*] Professor of Law, University of Richmond School of Law. Funding for this work was underwritten by the National Center for Justice and the Rule of Law at the University of Mississippi School of Law, which is supported by a grant from the Department of Justice, Office of Justice Programs, Bureau of Justice Assistance. I thank my friends and colleagues, John Douglass and Corinna Lain, for their comments on an earlier draft, and for enduring my endless ruminations on this topic.

[1] In construing probable cause for seizure of a person, *Gerstein v. Pugh,* 420 U.S. 103, 112 (1975) stated that this standard "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *See also* JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT: A STUDY IN CONSTITUTIONAL INTERPRETATION 13 (The Johns Hopkins Univ. Studies in Historical and Political Sci., Series No. 84, 1966) (the issues raised under the Fourth Amendment "bring into sharp focus the classic dilemma of order versus liberty in the democratic state").

[2] In addressing the conflict between enforcing the law in protection of the community, and protecting the community from unreasonable interferences with privacy, the Court has labeled probable cause as "the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." Brinegar v. United States, 338 U.S. 160, 176 (1949).

Probable cause, however, is but one form of justification for constitutional searches. *See infra* note 179 and accompanying text (discussing the Court's recognition of various forms of justification involving balancing and special needs).

case law on probable cause harbors a central ambiguity because the Court has told us that probable cause lies between bare suspicion and proof beyond a reasonable doubt.[3] Within this sizable range, "[t]he emphasis is on calculating likelihoods. Whether this excludes all other factors and whether the likelihood must be 'more likely than not' are questions arguably unsettled."[4]

Just how unsettled these questions are can be demonstrated by considering two hypotheticals:[5]

> 1. A small commuter plane takes off with two pilots, a flight attendant and ten passengers. When the attendant slips into the bathroom, a would-be hijacker locks her in and attempts to take over the plane. The attendant can discern the voices of five hijackers as they coordinate their attack on the cockpit. She then hears the voices of five passengers who rally to thwart the attempted hijacking. The stalemate ends when the pilot makes an emergency landing and the police take control of the plane. Predictably, the passengers split into two groups of five, each group claiming to be the heroic passengers while identifying the other group as the terrorists. The police thus face a situation where there is a 50/50 chance that each passenger is a terrorist.

Do these facts constitute probable cause to detain, arrest or search each passenger? Is there probable cause to search each passenger's luggage, their autos parked at the airport and their residences?

If the answers to the first hypothetical seem preordained

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[3] *Brinegar*, 338 U.S. at 175. "'The substance of all the definitions' of probable cause 'is a reasonable ground for belief of guilt.' And this 'means less than evidence which would justify condemnation' or conviction . . . [but] more than bare suspicion." *Id.* (quoting McCarthy v. De Armit, 99 Pa. 63, 69 (1881); Locke v. United States, 7 Cranch 339, 348 (1813)) (citations and footnote omitted).

[4] Valente v. Wallace, 332 F.3d 30, 32 (1st Cir. 2003) (citations omitted).

[5] These hypotheticals were inspired by Professor Nesson's famous "prisoner" hypothetical where only one of twenty-five identically dressed prisoners refuses to participate in the killing of a guard. Because Professor Nesson gives us no way to distinguish among the prisoners, the odds as to any one prisoner are a 96% likelihood of guilt, and a 4% likelihood of innocence. Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1192-93 (1979).

in a post-September 11 world, are the answers altered in any way when the facts of the hypothetical are modified as follows:

> 2. This time, when the attendant enters the bathroom, a defective latch temporarily locks her in. A nicotine deprived passenger seizes the opportunity to light a cigarette. The attendant can hear the voices of four other passengers who agree to share the cigarette. She also hears the protests of five passengers who object to the second-hand smoke. When the attendant frees herself and confronts the passengers, she is faced with two five person groups, each group claiming to be the non-smokers while identifying the others as the smokers.

Again, is there probable cause to detain, arrest or search each passenger? Is there probable cause to search each passenger's luggage, their autos parked at the airport and their residences?

This article seeks the answer to the hypotheticals in sources ranging from the judiciary's own pronouncements on probable cause to linguistics, history mathematics and cognitive psychology.

A Linguistic View of Probable Cause

If we begin at the beginning, we must give some attention to the common usage of the term "probable." "At first blush, the phrase [probable cause] seems to connote a standard akin to more than fifty percent,"[6] i.e., more likely than not that the search will turn up sought-after items or that the seized person is guilty of a crime. After all, if the weatherman says it's probably going to rain today, I assume he's talking about more than a 50% chance. But that assumption may not be universally shared. *Webster's* defines "probable" as meaning "supported by evidence strong enough to establish presumption but not proof."[7] Putting a legal spin on the words "presumption" and "proof," provides some support for the "more likely than not

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[6] Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 784 (1994).

[7] Webster's New Collegiate Dictionary 916 (1973).

standard." Juries in civil cases are instructed that the party with the burden of proof must convince them by a preponderance of evidence, i.e., more likely than not.[8] Judges apply presumptions to establish a *prima facia* case, a degree of likelihood sufficient to decide the issue until rebutted.

This slight linguistic support for equating "probable" with "more likely" is undercut, however, by the very same dictionary's alternative definition of "probable" as "likely to be or become true or real."[9] The word "likely" is not modified by the term "more likely," or by mathematical likelihoods such as 50%, 30%, and so on. About the only thing clear is that "likely to be or become true or real" sounds more certain than the dictionary's characterization of "possible," as "something that may or may not occur."[10] Like the Supreme Court, semantic interpretation of the term "probable" seems comfortable only with placing the term somewhere between the range of a 1% to 100% likelihood. The lower end of this range is identified as "mere possibility" in the dictionary, and as "mere conjecture" in the Court's lexicon. The upper end of the range is referred to in the dictionaries as "presumption but not proof," while the Court prefers the terminology of "less than proof beyond a reasonable doubt." In short, the Court has its own preferred language, but has neither improved upon nor worsened the linguistic uncertainty surrounding the term probable.

Still lurking somewhere in that semantic tangle between 1% and 100% likelihood is the dividing line between probable and improbable. When the Court speaks of "fair probability,"[11] it implicitly recognizes that there must be a contrasting "unfair probability," often labeled mere speculation or conjecture. Spec-

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[8] A typical jury instruction in a civil action is:

> [I]t is proper to find that a party has succeeded in carrying the burden of proof on an issue of fact if, after consideration of all the evidence in the case, the jurors believe that what is sought to be proved on that issue is more likely true than not true.

2 HON. EDWARD J. DEVITT & CHARLES B. BLACKMAR, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 71.13 (3d ed. 1977).

[9] WEBSTER'S, *supra* note 7, at 917.

[10] *Id.*

[11] Illinois v. Gates, 462 U.S. 213, 238 (1983).

ifying a standard of certainty for probable cause necessarily entails drawing a dividing line on the spectrum of uncertainty. As is so often the case in life and the law, we are faced with drawing a dividing line. To recognize this task is not to abandon hope because Justice Holmes assured us that the question of where to draw the line is "pretty much everything worth arguing in the law."[12]

If linguists and Supreme Court Justices haven't pinned down this elusive creature called probable cause, perhaps our forefathers did the heavy lifting for us and settled upon a more precise definition of the term. At this point we can turn from the dictionaries to the history books in search of an answer.

A Historical View of Probable Cause

"A natural starting point for those trying to solve the various puzzles of the Fourth Amendment, including the meaning of probable cause, is in the English and American colonial past."[13] Unfortunately, a number of recent scholarly examinations of the Fourth Amendment in general, and probable cause in particular, have despaired of finding a definitive answer. Craig S. Lerner, in *The Reasonableness of Probable Cause*, concludes that "the precise phrase [probable cause] appears to have been relatively uncommon in colonial practice,"[14] and that when the phrase was used, "far from being a single standard, [probable cause] seems to have been a variable one, both across time and within a given time period."[15] For example, within the seventeenth century Coke "argued that a warrant could issue only after an indictment and not upon what he termed 'bare surmise[,]' [but] [t]his view was forcefully and repeatedly criticized in the mid-seventeenth century by Matthew Hale."[16]

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[12] Irwin v. Gavit, 268 U.S. 161, 168 (1925).

[13] Craig S. Lerner, *The Reasonableness of Probable Cause*, 81 Tex. L. Rev. 951, 972 (2003).

[14] *Id.* at 979.

[15] *Id.* at 978.

[16] *Id.* at 974 (footnote omitted).

In *The Birth of Probable Cause,*[17] Jack K. Weber traces the earliest first-hand discussion of probable cause to Bracton's writings in the late thirteenth century, but concludes that "Bracton's concepts are bundled together in an imprecise way. There are no supporting cases and we cannot pin down from his generalizations the precise level of information needed in each instance."[18] Rather than provide a precise definition of probable or adequate cause, Weber leaves us with a rather amorphous standard that he says represents the "horse sense of the ages," a theme that reappears in one of the current approaches to probable cause as a matter of "common sense."[19]

From its origins until the enactment of the Fourth Amendment, probable cause seems to have remained in a state of flux.[20] The historian William Cuddihy has contrasted various enactments of the First Congress of the United States which embraced differing thresholds for the issuance of search warrants.[21] The Collection Act of 1789 created a low evidentiary standard for the issuance of a warrant, removed altogether a magistrate's discretion to refuse a warrant, and largely insulated the officer from suit if the search failed to uncover evidence of crime.[22] By contrast, The Excise Act of 1791 created a higher evidentiary burden, invested magistrates with the discretion to refuse warrants and was far more liberal in affording those searched with civil remedies.[23]

In *The Fourth Amendment and Common Law,*[24] David A.

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[17] Jack K. Weber, *The Birth of Probable Cause*, 11 ANGLO-AM. L. REV. 155 (1982).

[18] *Id.* at 161.

[19] *See infra* text accompanying notes 168-69.

[20] In 1766, George Mason protested against a British statute's use of the term "probable Cause of Complaint," because the word probable was "a word before an unknown in the Language and Style of Laws!" Lerner, *supra* note 13, at 979 (quoting Letter from George Mason to the Committee of Merchants in London (June 6, 1766), in 1 PAPERS OF GEORGE MASON 65, 67 (Robert A. Rutland ed., 1970)).

[21] William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 1550 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School).

[22] Cuddihy, *supra* note 21, at 1527.

[23] *Id.* at 1528, 1543.

[24] David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739 (2000).

Sklansky issues a broad challenge to the Court's new found emphasis on common law history and its failure to recognize that common law rules of search and seizure were both hazier and less comprehensive than the Court has suggested. Professor Sklansky is particularly critical of

> how Justice Scalia and Justice Thomas speak in their recent Fourth Amendment opinions. To find the rule 'at common law' they look sometimes to cases, sometimes to statutes, sometimes to commentaries. They refer interchangeably to authorities from the 1600s and 1700s—and sometimes also from the 1800s and early 1900s. They mix together English and American materials.[25]

Professor Sklansky maintains that even if there were an accepted common law definition of probable cause, and it appears there was not, most of those who ratified the Constitution and adopted the Bill of Rights were not lawyers, and they would have been unlikely to view probable cause as a term of art. In fact there is little evidence that most of them had mastered the common-law rules of search and seizure, let alone endorsed them.

> [D]uring the debates . . . over ratification of the proposed Constitution, those concerned about the search-and-seizure powers of the federal government consistently called for an amendment restraining those powers "within proper bounds," or forbidding "all unreasonable searches and seizures." No one proposed a constitutional ban on searches and seizures "contrary to common law," or "currently illegal under state law."[26]

These recent historical inquiries suggest that the first failing of Fourth Amendment history is its inability to provide a clear meaning for the term probable cause. But an even more serious shortcoming of this type of historical inquiry is the realization that even if we could learn with certainty what the common law meant, there remains the fundamental ques-

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[25] *Id.* at 1795.

[26] *Id.* at 1792 (footnote omitted).

tion—"So what?" Prior to Justice Scalia's "originalist" approach to the Fourth Amendment, the Court had informed us that

> [t]he common-law rules governing searches and arrests evolved in a society far simpler than ours is today. Crime has changed, as have the means of law enforcement, and it would therefore be naive to assume that those actions a constable could take in an English or American village three centuries ago should necessarily govern what we, as a society, now regard as proper.[27]

A reluctance to adopt common law history as the *sine qua non* of Fourth Amendment interpretation appears frequently in Supreme Court cases decided in the 1980s. For example, in *Tennessee v. Garner*,[28] the Court acknowledged that it "has not simply frozen into constitutional law those law enforcement practices that existed at the time of the Fourth Amendment's passage."[29] The *Garner* Court found the use of deadly force to stop all fleeing felons "unreasonable" under the Fourth Amendment, despite common-law approval of the practice.[30] The old rule, the Court concluded, no longer made sense. In the past decade or so, however, Justice Scalia has replaced the Court's hesitance to follow common law precedent with a strict "originalist" approach to constitutional interpretation. His approach maintains that "the principal criterion for assessing whether searches and seizures are 'unreasonable' within the meaning of the Constitution is whether they were allowed by eighteenth-century common law."[31] "This new form of Fourth

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[27] Steagald v. United States, 451 U.S. 204, 217 n.10 (1981). "The Bureau of Justice note[d] that as of 1996, there were more than 700,000 police officers in the United States, which is roughly one police officer for every 400 citizens." Lerner, *supra* note 13, at 1019 n.452 (citing Bureau of Justice Statistics, Census of State and Local Law Enforcement Agencies 1996 (1998)). In contrast, in 1811 there was one constable in England for every 18,187 persons. Jerome Hall, *Legal and Social Aspects of Arrest Without a Warrant,* 49 HARV. L. REV. 566, 582 (1936).

[28] 471 U.S. 1 (1985).

[29] *Garner*, 471 U.S. at 13 (quoting Payton v. New York, 445 U.S. 573, 591 n.33 (1980)).

[30] *Id.* at 14.

[31] Sklansky, *supra* note 24, at 1739.

Amendment originalism breaks dramatically . . . with the ahistoric approach of the Warren and Burger Courts . . . [and] with an older tradition of using the background of the Fourth Amendment to illuminate not its precise demands but its general aims."[32]

Judge Richard Posner has been particularly critical of this "originalist" approach, suggesting that it is a sham, with a "judge . . . do[ing] the wildest things, all the while presenting himself as the passive agent of the sainted Founders—don't argue with me, argue with Them."[33] Whether or not one agrees with Judge Posner's criticism, the Court has demonstrated an uncanny ability to simultaneously select and ignore relevant common law precedent. For example, in *California v. Hodari D.*,[34] the majority adopted the common law definition of a seizure of a person as requiring either an actual touching or a submission to a show of authority.[35] Thus, an escaping suspect is not seized so long as he continues to flee. The dissent, however, urged the Court to look "not to the common law of arrest, but to the common law of attempted arrest."[36] Although a common law arrest required either touching or submission, the common law also recognized that "an officer might be guilty of an assault because of an attempted arrest, without privilege, even if he did not succeed in touching the other."[37] The majority countered, however, that "neither usage nor common-law tradition makes an *attempted* seizure a seizure. The common law may have made an attempted seizure unlawful in certain circumstances; but it made many things unlawful, very few of which were elevated to constitutional proscriptions."[38]

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[32] *Id.*

[33] RICHARD A. POSNER, OVERCOMING LAW 251 (1995). Professor Tribe also cautioned against using the passive voice which "makes it look as though someone out there, unspecified, is doing it to us. Admit that it's we who are doing it." Laurence H. Tribe, *Seven Deadly Sins of Straining the Constitution Through a Pseudo-scientific Sieve*, 36 HASTINGS L.J. 155, 170 (1984).

[34] 499 U.S. 621 (1991).

[35] *Hodari D.*, 499 U.S. at 628.

[36] *Id.* at 632 (Stevens, J., dissenting).

[37] Rollins M. Perkins, *The Law of Arrest,* 25 IOWA L. REV. 201 (1990) (citing *Gold v. Bissell*, 1 Wend. 210 (N.Y. Sup. Ct. 1828).

[38] *Hodari D.*, 499 U.S. at 626 n.2.

The *Hodari D.* majority did not explain why it had selectively incorporated common law arrests into Fourth Amendment jurisprudence, while refusing to assimilate common law concepts of attempted arrests.[39] Recognition of a common law arrest as "the quintessential 'seizure of the person' under our Fourth Amendment jurisprudence"[40] does not mean that the Court must banish common law prohibitions of attempted arrests to the trash bin of peculiar historical practices that cannot be "elevated to constitutional proscriptions."[41] After all, intrusion into residential dwellings is the prototypical search specified in the Constitution,[42] but the Court has extended Fourth Amendment coverage to commercial premises,[43] automobiles,[44] and quasi-public areas like telephone booths.[45]

In the final analysis Fourth Amendment history appears to fail us on two counts. First, it does not provide a clear, precise or even commonly accepted definition of probable cause.[46] Second, the common law's judgments about search and seizure are necessarily time-bound by the era in which they arose. They may provide limited guidance, but they are not dispositive of modern day search and seizure issues.

[W]e make a serious mistake to accept the belief that the past

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[39]

> The Court has adopted an abridged version of the Amendment's history . . . . This truncated view of history simply does not reflect the Framer's thoughts about the Fourth Amendment's constitutional meaning. In sum, the Court has ignored the complexity of the Fourth Amendment's origins, and as a result has denied itself and the nation the potential benefits of a comprehensive historical inquiry.

Tracy Maclin, *Let Sleeping Dogs Lie: Why the Supreme Court Should Leave Fourth Amendment History Unabridged*, 82 B.U. L. REV. 895, 973 (2002).

[40] *Hodari D.*, 499 U.S. at 624.

[41] *Id.* at 626 n.2.

[42] *See* Payton v. New York, 445 U.S. 573, 585-90 (1980).

[43] See v. City of Seattle, 387 U.S. 541, 546 (1967).

[44] California v. Carney, 471 U.S. 386, 390 (1985).

[45] Katz v. United States, 389 U.S. 347 (1967).

[46] Even Justices Scalia and Thomas may be abandoning their focus on history and common law. *See* Groh v. Ramirez, 124 S. Ct. 1284, 1298 (2004) (Thomas, J., dissenting) (stating "it is possible that neither the history of the Fourth Amendment nor the common law provides much guidance" in discussing the relationship between the Amendment's two clauses).

> has done its work for the present, and that our liberty, which is the cornerstone of democracy, is guaranteed. The truth is that one generation can never protect the rights of another, and although all of our great documents: the Declaration of Independence, the Constitution, and the Bill of Rights, are ideal reflections of our finest aspirations, they are not self-fulfilling chariots of justice. For all their beauty, they are only words, dependent on each generation to give them a meaning and content for its own time and place.[47]

JUDICIAL ANALYSIS OF PROBABLE CAUSE—PIGEONHOLING WITHOUT CROSS-REFERENCING

"'The substance of all the definitions' of probable cause 'is a reasonable ground for *belief* of guilt.'"[48] In *Texas v. Brown*,[49] a four person plurality declared that this reasonable belief need not be "correct or more likely true than false. A 'practical, nontechnical' probability that incriminating evidence is involved is all that is required."[50] A majority of the Court has never explicitly held that probable cause is less than a preponderance of the evidence, and the Court has been inconsistent in the few decisions where it has addressed the burdens of proof that apply to various Fourth Amendment issues. The prime example of this troubling approach is *Maryland v. Buie*,[51] where the Court managed to be both opaque and inconsistent.

When discussing the Fourth Amendment standard of proof that applies to a protective sweep of the defendant's premises, the only clear aspect of *Buie* was the Court's rejection of "an unnecessarily strict Fourth Amendment standard" requiring "a protective sweep to be justified by probable cause to believe that a serious and demonstrable potentiality for danger existed . . . ."[52] It is difficult, however, to decipher the following pas-

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[47] Sol Wachtler, *Our Constitutions—Alive and Well*, 61 ST. JOHN'S L. REV. 381, 387 (1987).

[48] Brinegar v. United States, 338 U.S. 160, 175 (1949) (emphasis added) (quoting McCarthy v. De Armit, 99 Pa. 63, 69 (1881)).

[49] 460 U.S. 730 (1983).

[50] *Brown*, 460 U.S. at 742.

[51] 494 U.S. 325 (1990)

[52] *Buie*, 494 U.S. at 336-37.

sage in which the Court formulates the correct standard to be applied:

> The type of search we authorize today . . . may be conducted only when justified by a *reasonable, articulable suspicion* that the house is harboring a person posing a danger to those on the arrest scene. . . .
>
> . . . The Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a *reasonable belief* based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene.[53]

Within a couple of sentences, the Court referred to the standard of proof as both reasonable suspicion and reasonable belief. One of the few areas of clarity involving probable cause is the Court's recognition of a hierarchy of certainty, i.e., probable cause requires a greater degree of likelihood than does suspicion. The clarity arises primarily from logic and linguistics, not from the Court's sometimes cavalier use of the terms belief and suspicion. As a logical matter, any distinction between reasonable suspicion and reasonable belief must rest on the meaning of the words suspicion and belief, not on the meaning of the identical modifier—reasonable. Common usage of the terms belief and suspicion also accords with the Court's placement of these terms within a scale of certainty. For example, *Webster's* defines "believe" as having "a firm conviction" or "to consider to be true,"[54] while suspicion involves merely "slight evidence" or "uncertainty."[55] When the Court uses the terms suspicion and belief in a consistent manner, we have the tools for distinguishing two constitutional levels of certainty.[56] In contrast, when the Court states that searches, seizures and

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[53] *Id.* at 337 (emphasis added).

[54] WEBSTER'S, *supra* note 7, at 101.

[55] *Id.* at 1174.

[56] In most contexts, the court uses the term probable cause "to refer to a quantum of evidence for the belief justifying the search, to be distinguished from a lesser quantum such as 'reasonable suspicion.'" Griffin v. Wisconsin, 483 U.S. 868, 877 n.4 (1987).

temporary detention must all be based on "reasonable grounds," any distinction between degrees of likelihood is lost in a muddled consideration of the "totality of the circumstances."

The useful distinction between belief and suspicion was emphasized in *Richards v. Wisconsin*,[57] in the discussion of the justification required for "no-knock" entry.[58] The Court held in *Richards* that the police must have a reasonable suspicion that knocking and announcing their presence would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence.[59] The Court explained that its choice of the standard of reasonable suspicion "—*as opposed to a probable-cause requirement*—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries."[60] *Richards* is one of the few cases in which the Court effectively cross-referenced and contrasted the levels of certainty required by suspicion and belief (probable cause). *Buie*, on the other hand, blurred the distinction by interchanging the terms reasonable suspicion and reasonable belief. Whether that blurring rests upon a slip of the pen, or the Court's failure to adhere to its prior distinction between suspicion and belief, we can register our legitimate concern over the Court's lack of precision when discussing the level of certainty required by the Fourth Amendment.

The Court's tendency to pigeonhole, but not cross-reference, degrees of certainties is also reflected in its discussion of the inevitable discovery doctrine. The question of whether illegally seized evidence likely *would* (inevitably) have been discovered by lawful means is akin to the nature of probable cause, i.e. whether evidence to be seized likely *will* be discovered by a lawful search. Despite the ambiguity surrounding the

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[57] 520 U.S. 385, 394 (1997).
[58] *Richards*, 520 U.S. at 394.
[59] *Id.*
[60] *Id.* (emphasis added).

forward looking nature of probable cause,[61] *Nix v. Williams*[62] was clear with respect to the backward-looking nature of the inevitable discovery doctrine.[63] *Nix* required the government to meet the more-likely-than-not standard in order to avail itself of the inevitable discovery doctrine.[64] In fact the only debate in *Nix* was whether to adopt the preponderance standard or the higher standard of "clear and convincing evidence." The *Nix* dissent argued for the clear and convincing evidence standard because "[i]ncreasing the burden of proof serves to impress the factfinder with the importance of the decision and thereby reduces the risk that illegally obtained evidence will be admitted."[65]

If the risk that unjustified searches and seizures will occur is substituted for the risk of admitting illegally obtained evidence, the *Nix* dissent's argument for a high standard of proof could be transposed to the probable cause requirement. After all, a higher standard of certainty would seem most needed when authorizing future searches that may well impact on innocent people.[66] In contrast, *Nix* involved a situation where the past search produced clear evidence of the defendant's guilt.[67] The higher standard adopted in *Nix* is particularly sur-

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[61] The Court has stated:

> [T]he protection of the Fourth and Fourteenth Amendments "can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement."

New York v. Belton, 453 U.S. 454, 458 (1981) (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 SUP. CT. REV. 127, 142).

[62] 467 U.S. 431 (1984).

[63] *Nix*, 467 U.S. at 431 (addressing a violation of the Sixth Amendment).

[64] *Id.* at 444. Evidence will not be excluded "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . ." *Id.*

[65] *Id.* at 459-60 (Brennan, J., dissenting).

[66] *See generally*, Arnold H. Loewy, *The Fourth Amendment as a Device for Protecting the Innocent*, 81 MICH. L. REV. 1229 (1983).

[67] *Nix*, 467 U.S. at 434-35. Protection of the innocent against unreasonable searches and seizures would be largely a prospective matter, because, as a practical matter, the trial court will be determining probable cause in a suppression hearing where the seized evidence is likely to be damning. The higher standard

prising in light of the Court's expressed hostility to the truth defeating nature of the exclusionary rule.[68] Had the Court thought to compare the levels of certainty required for probable cause and for "inevitable discovery," it might have been surprised at what it had wrought. If, however, the Court sees a symmetry in the standards of certainty it requires from the government, we would all benefit from an articulation of that symmetry. To date, the Court has not only failed to define the level of certainty that constitutes probable cause, the Court has failed to explain the underlying principle governing its choice among standards such as suspicion, belief, preponderance, and clear and convincing.[69]

A Mathematical Approach to Probable Cause

In *Trial by Mathematics: Precision and Ritual in the Legal Process*, Professor Laurence H. Tribe gave us one view of the evolutionary role mathematics has played in the legal system:

> The system of legal proof that replaced trial by battle in Continental Europe during the Middle Ages reflected a starkly numerical jurisprudence. The law typically specified how many uncontradicted witnesses were required to establish

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in *Nix* is aimed, in part, to protect against the attractiveness of 20-20 hindsight (e.g., "of course our police department is competent and would have found the evidence"). A court's determination of probable cause is likely to be influenced by hindsight in a similar way, and thus requires similar protection by a similar standard of proof.

[68] As Professor Akil Amar suggested:

> [S]hould not the law strongly presume that somehow, some way, sometime, the truth would come out? Criminals get careless or cocky; conspirators rat; neighbors come forward; cops get lucky; the truth outs; and justice reigns—or so our courts should presume, and any party seeking to suppress truth and thwart justice should bear a heavy burden of proof.

Amar, *supra* note 6, at 794.

[69] The Court has also used the phrase "reasonable probability" when determining violations of constitutional discovery rights. In that context, the Court has stated that a material violation "does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted unlimitedly in the defendant's acquittal . . . . A 'reasonable probability' of a different result is accordingly shown when the government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" Kyles v. Whitley, 514 U.S. 419, 434 (1995) (citations omitted).

> various categories of propositions, and defined precisely how many witnesses of a particular class or gender were needed to cancel the testimony of a single witness of a more elevated order. So it was that medieval law, nurtured by the abstractions of scholasticism, sought in mathematical precision an escape from the perils of irrational and subjective judgment.
>
> In a more pragmatic era, it should come as no surprise that the search for objectivity in adjudication has taken another tack. Yesterday's practice of numerology has given way to today's theory of probability, currently the sine qua non of rational analysis.[70]

The continuing development of modern science has fostered a desire to quantify legal doctrines such as probable cause. Soft facts and "mushy" legal concepts increasingly are seen as inferior to hard facts and objective analysis, and concrete statistical inference is to be preferred to intuitive judgment. Thus, some urge that law in general and probable cause in particular should be made amenable to mathematical formulation.[71]

The judiciary, however, has cautioned against being seduced by the allure of objectivity and precision in mathematics. "Mathematics, a veritable sorcerer in our computerized society, while assisting the trier of fact in the search for truth, must not cast a spell over him."[72] In its most comprehensive discussion of probable cause, the Supreme Court stated that "an effort to fix some general, numerically precise degree of certainty corresponding to 'probable cause' may not be helpful . . . ."[73] Instead, probable cause remains "a fluid concept . . . not readily, or even usefully, reduced to a neat set of legal rules."[74]

If we seek to find the appropriate middle ground between being the master or slave of mathematical precision, we must

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[70] Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329, 1329 (1971) (footnote omitted)

[71] "[T]he question inevitably arises in any discussion of probable cause: just how probable? There is the vague impression that, if law were truly a serious enterprise, the answer would be amenable to mathematical form." Lerner, *supra* note 13, at 995.

[72] People v. Collins, 438 P.2d 33, 33 (Cal. 1968).

[73] Illinois v. Gates, 462 U.S. 213, 235 (1983).

[74] *Gates*, 462 U.S. at 232.

consider three questions: (1) Should mathematical probabilities be used as evidence to meet the standard of probable cause, at whatever level of certainty the standard is set? (2) To what extent should mathematical probabilities replace or compliment intuitive appraisals? (3) Should probable cause be expressed as a mathematical likelihood?

USE OF STATISTICAL EVIDENCE

All proof is ultimately "probabilistic" in the sense that no conclusion can ever be drawn from empirical data without some step of inductive inference. The question is whether to bring this probabilistic element of inference to explicit attention in a quantified way, i.e., in overtly probabilistic evidence.

> Perhaps the most common type of overtly probabilistic evidence involves base rates which are defined as the relative frequency with which an event occurs or an attribute is present in a population. The base rate for an event or attribute equals the probability that it will be present in any randomly selected member of the reference class prior to the introduction of case-specific or individuating information.[75]

For example, in the airplane hypotheticals at the start of this article, the base rate is a 50% probability that any particular passenger is guilty. The question of probable cause might be resolved at this point purely on the basis of probability theory—a legal determination that a 50% likelihood constitutes adequate probable cause to arrest and search. Yet the law seems uncomfortable with relying wholly on base rates and making the leap from aggregate likelihood to a conclusion of probable cause in a specific case.[76] "Background evidence is

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[75] Jonathan J. Koehler & Daniel N. Shaviro, *Veridical Verdicts: Increasing Verdict Accuracy Through the Use of Overtly Probabilistic Evidence and Methods*, 75 CORNELL L. REV. 247, 252 (1990).

[76] In *United States v. Leon*, 468 U.S. 897, 943 (1984), Justice Brennan cautioned that "personal liberties are not rooted in the law of averages." *See also* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2164 (2002) ("Current Fourth Amendment law discourages group seizures. . . . Aggregate justifications—no one person is reasonably suspected, but the odds are high that some members of the group are criminals—do not suffice.").

considered somehow inferior to evidence that is individuating and specific to the case at hand."[77]

In our hijacking hypothetical, non-mathematically based probable cause might be satisfied by case-specific evidence like the flight attendant's claim that she could recognize all ten voices she heard on the plane. After some minimal assurances that she was reasonably confident of her ability, the police might utilize her voice identifications to sort the ten suspects into the likely guilty and the likely innocent. Suppose, however, that the police disdained case-specific facts and used additional statistics to sort the suspects according to who most closely matched a profile of hijackers. In a crude example, the police cite a study establishing that people from Middle-Eastern countries are ten percent more likely than the general population to hijack a plane. Should the law of probable cause distinguish between the overtly probabilistic hijacker profile and the case-specific voice identifications made by the flight attendant? Why should there even be a question of discounting the starkly numerical likelihood reflected in the profile, when no one questions establishing probable cause based upon circumstantial evidence or statements from witnesses or informants of doubtful credibility?[78]

One objection to relying on statistical likelihoods is that arresting or searching based solely on a bare probability (i.e., favorable "betting odds") wrongfully "gambles" with a citizen's liberty or privacy. Thus, the argument goes, law enforcement authorities should be barred from searching or seizing on the basis of bare statistics.[79] This claim ignores the reality that a similar gamble exists whenever there is any doubt about the defendant's guilt, regardless of whether the doubt arises from statistics or case-specific evidence. After all, how sure is the

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[77] Koehler & Shaviro, *supra* note 75, at 262.

[78] *See* Illinois v. Gates, 462 U.S. 213 (1983); Spinelli v. United States, 378 U.S. 410 (1969).

[79] The "[a]uthority of police officers to spy on occupants of toilet booths—whether in an amusement park or a private home—will not be sustained on the theory that if they watch enough people long enough some malum prohibitum acts will eventually be discovered." State v. Bryant, 177 N.W.2d 800, 801 (Minn. 1970)

flight attendant that she can distinguish ten voices, and how sure are we of her professed ability to make such distinctions?[80] All evidence is probabilistic, requires inferences to support an ultimate conclusion, and thus involves a risk of error. Statistical evidence is different only in that it makes these uncertainties explicit. Society cannot avoid "gambling" with citizens' liberties unless one hundred percent certainty becomes the prerequisite to arrests and searches. Any aversion to gambling with a defendant's liberty and privacy suggests raising the burden of proof for all cases. "It does not support a special rule for statistical-probability cases."[81]

A second objection to relying on statistical likelihoods is that arresting or searching based wholly on a bare statistical probability violates the principle that citizens should be treated as unique individuals.[82] The profiling evidence in the hijacking hypothetical focuses not on a suspect's own attributes, but on background information that describes the statistical attributes of a broader class of individuals, i.e., residents of Middle-Eastern countries. An unavoidable feature of probabilistic thinking is that it treats people as members of a group rather than as individuals. Some commentators suggest that this focus violates an ethical command to treat citizens as unique individuals and to judge them only on evidence about their own conduct or matters within their own control.[83] We should, the argu-

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[80] The flight attendant may have first-order uncertainty, e.g., she may be 60% sure of her identification of any voice. The police, however, may have a second-order uncertainty if they are only 50% confident of her ability to distinguish among the voices. Empirical studies suggest that people making judgments and decisions generally take both first-order and second-order uncertainty into account. Koehler & Shaviro, *supra* note 75, at 251.

[81] Daniel Shaviro, *Statistical-Probability Evidence and the Appearance of Justice*, 103 HARV. L. REV. 530, 538 (1989).

[82] Some fear that using numerical terms leads to "the dehumanization of the legal process." Kevin M. Clermont, *Procedure's Magical Number Three: Psychological Bases for Standards of Decision*, 72 CORNELL L. REV. 1115, 1147 (1987).

[83] One commentator has stated that

> the Fourth Amendment is the commitment to treating persons who come before the law on the basis of their individual, particular, uncommon, and odd property and attributes. Juristic procedures which help show the unique characteristics of individuals and actions to the decision-maker provide the factual evidentiary base for legal judgments which avoid ab-

ment goes, apply to the search and seizure phase the instinctive reluctance to convict and punish a person based on statistical evidence that the defendant is one among many, or even a few, who could have committed the crime.[84]

Of course we all know that innocent people are sometimes convicted by an imperfect criminal justice system. But deliberately sacrificing an innocent person, by say, convicting all ten passengers on our hypothetical airplane, seems worse than simply acknowledging a long-run statistical chance of unjust convictions. As an analogy, consider the difference between a suicide bomber and a volunteer for a suicide mission where death is highly likely, but not certain. Western society views the latter as an act of heroism, while generally condemning the former. Yet, however much society seeks to prevent the ultimate conviction and punishment of the innocent, the concept of probable cause accepts that some innocent people will be required to surrender their liberty or privacy at the early investigative stages of search and seizure.[85]

Once we acknowledge that innocents may be searched and seized, any differentiation between "individualized" case-specific evidence and "statistical" evidence is largely illusionary. For example, what was suspicious about the conduct observed in

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stract moral structures and remain useful as explanations of external phenomena.

Gary A. Ahrens, *Privacy and Property: Can They Remain After Juridical Personality Is Lost?*, 11 CREIGHTON L. REV. 1077, 1082 (1977) (footnote omitted).

The law's respect for autonomy counsels focusing on factors that can be controlled by the suspect whose liberty and privacy are to be set aside. "The citizen who has given no good cause for believing he is engaged in [transportation of contraband] is entitled to proceed on his way without interference." Brinegar v. United States, 338 U.S. 160, 177 (1949).

[84] This instinctive reluctance was the focus of Professor Nesson's prisoner hypothetical. *See supra* note 5. "Group guilt can be both immensely powerful and deeply troubling when used to punish people *or focus suspicion on them* merely for their associations . . . ." David A. Harris, *Using Race or Ethnicity as a Factor in Assessing the Reasonableness of Fourth Amendment Activity: Description, Yes; Prediction, No*, 73 MISS. L.J. 423, 451 (2003) (emphasis added).

[85] *Terry v. Ohio*, 392 U.S. 1 (1968), "accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent." Illinois v. Wardlow, 528 U.S. 119, 126 (2000).

Terry v. Ohio, where Officer McFadden observed two men take turns walking down the street to stare into a window twenty-four times, conferring with each other after each trip.[86] Presumably Officer McFadden's past experience provided him with a generalized view of how innocent shoppers act. The suspects observed by Officer McFadden did not fit this unscientific profile of an innocent shopper. The point was well illustrated in the following hypothetical:

> Assume that the Cleveland Police Chief asked Officer McFadden and other similarly experienced officers to address a class of new recruits at the police academy on the topic, "What to Look for in Preventing Burglaries." Could a recruit take notes at this lecture and then rely on the experience of Officer McFadden and Officer McFadden's colleagues to justify the recruit's own reasonable suspicion in making future stops?[87]

If the answer to the question is yes, it is difficult to conclude that hijacker profiles cannot be used because they are not *individualized*. "[T]he suspicion underlying the detention of a person believed to be a potential criminal is often based on police experience with previous crimes under similar circumstances . . . ."[88] Thus, like other decision-makers, police inevitably act on stereotypes derived from their experience.

The explicit use of profiles or other statistical compilations in searches and seizures mirrors the type of probabilistic thinking that increasingly appears in many areas of the law. For example, sentencing guidelines and "three strikes and you're out" laws treat offenders as members of a group rather than as unique individuals. Thus, all offenders with three requisite convictions who are sentenced on a new offense are considered to pose a similar risk of recidivism and to warrant similar sentences. Such an assessment ignores, or gives little weight to, a particular offender's individuality. Instead, the

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[86] *Terry*, 392 U.S. at 5.

[87] JOHN MONAHAN & LAURENS WALKER, SOCIETY SCIENCE IN LAW: CASES AND MATERIALS 225 (1985).

[88] Christopher Slobogin, *The World Without a Fourth Amendment*, 39 U.C.L.A. L. REV. 1, 83 (1991).

three-time offender is judged, as would be a person matching a profile, on the behavior of others in his group.[89] Although "three strikes" laws are relatively recent developments, Professor Morgan Cloud has examined some largely ignored historical practices that led him to conclude that "the Founders of our constitutional scheme accepted some seizures based upon group identity as necessary responses to national crises."[90]

Those who criticize sentencing guidelines, profiles and other stereotyping, seem to take as a given that stereotyping always works to the detriment of the individual, whereas treating people as individuals always works to the benefit of the individual.[91] Yet, one might wonder whether persons who lost their liberty or privacy because of the exclusion of statistical evidence would derive much solace from being "treated as a unique human being." In our hijacking hypothetical, suppose the same profile that attributed a ten percent likelihood of guilt to suspects from Arab countries, indicated that there was a ninety-nine percent likelihood that citizens of Iceland would not hijack a plane. If the police treat Arabs and Icelanders alike, will the Icelander applaud such equality, or claim reverse discrimination favoring Arabs in spite of the Icelander's empirically superior score on the hijacker profile?

When statistical studies uncover disproportionate offending rates among a distinct group, simple efficiency [not racial or ethnic prejudice] points toward devoting greater law enforcement resources to this disproportionate group.[92] Efficiency

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[89] *See generally* Bernard E. Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model in Criminal Law*, LAW & CONTEMP. PROBS. 99 (2003).

[90] Morgan Cloud, *Quakers, Slaves and the Founders: Profiling to Save the Union*, 73 MISS. L.J. 369, 418 (2003).

[91] *But see* William J. Stuntz, *Local Policing After the Terror*, 111 YALE L.J. 2137, 2169 (2002) ("Some marginal substitution of group searches for individual ones is very likely to raise the quality of police treatment of suspects even as it raises the ability of the political process (instead of the courts) to regulate policing. These are real social gains.").

[92] "All nineteen of the suicide hijackers of September 11 were from one narrow demographic group: they were young Muslim men from the Arab world. How could it *not* make sense to target our enforcement efforts at these same people?" Harris, *supra* note 84, at 426-27 (2003). Professor Harris ultimately concluded that racial profiling "is a legal, moral and practical dead end." *Id.* at 428.

considerations become particularly relevant if hijacker profiles and other screening measures are seen as promoting deterrence,[93] not just apprehension of the guilty. In particular, viewing the war on terrorism as a preemptive rather than reactionary endeavor suggests that profiles and screening measures may be the best way of insuring that terrorism never succeeds. The specter of hijacker profiles and airport screening is more likely to deter would-be-terrorists than is the fear that they will be betrayed by case-specific facts such as someone spotting a bomb fuse protruding from their tennis shoes.[94]

There are of course many valid objections to profiling,[95] but these objections involve policy considerations independent of the empirical validity of the profiles.[96] Although the law generally seeks to maximize factual accuracy, criteria other than error minimization also must be considered. The rules of evidence governing logical and legal relevance are particularly instructive in this regard. At trial, a fact-finder motivated solely by the interest in factual accuracy considers all logically probative evidence.[97] Similarly, if the only function of probable cause is to ensure an accurate factual determination, then

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[93] *See* United States v. Martinez-Fuerte, 428 U.S. 543, 552, 557 (1976) (stating an individualized suspicion requirement at roadblocks "would largely eliminate any deterrent to the conduct of well-disguised smuggling operations, even though smugglers are known to use these highways regularly").

[94] When the goal is deterrence, insistence on case-specific facts becomes problematic because the goal is to prevent such facts from developing, i.e., to prevent potential threats at an early stage before they become mass disasters. If the government must wait until sufficient case-specific facts develop, its goal of deterrence has been frustrated.

[95] *See generally* Symposium, *The Permissibility of Race or Ethnicity as a Factor in Assessing the Reasonableness of a Search or Seizure*, 73 MISS. L.J. 365 (2003).

[96] Racial profiling is a repugnant practice "not because it is irrational (in the sense of statistically inaccurate) but because it flouts the moral principle that it is wrong to judge an *individual* using the statistics of a racial or ethnic *group*. The argument against bigotry, . . . [is] a rule of ethics, that tells us when to turn our statistical categorizers off." STEVEN PINKER, HOW THE MIND WORKS 313 (1997).

[97] "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." FED. R. EVID. 401.

scientifically valid profiles cannot be discounted.[98] Legal relevance, however, introduces the type of extraneous policy considerations that may counterbalance the interest in logical validity,[99] and Courts are often called upon to exclude probative evidence in order to serve important social goals. Within the context of the Fourth Amendment, we need look no further than its exclusionary rule, which excludes probative evidence and thus, presumably reduces factual accuracy. Application of the exclusionary rule recognizes that, at times, the quest for factual accuracy must be subordinated to the policy interest in deterring violations of the right to be free of unreasonable searches and seizure. Similarly, when assessing the use of profiles, it is valid to ask whether their logical relevance is outweighed by the social costs of permitting police to target people based on factors such as race or ethnic origin.[100] However, any reluctance to permit police to engage in profiling should not be based on a blanket rejection of the factual reliability or social costs of all profiles. Surely, with all the various profiles that abound,[101] some are scientifically valid while others are

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[98] J.C. Ball, *The Moment of Truth: Probability Theory and Standards of Proof*, 14 VAND. L. REV. 807, 817 (1961) (stating the proper standard of proof is the one that causes the smallest number of mistakes); David Kaye, *The Laws of Probability and the Law of the Land*, 47 U. CHI. L. REV. 34, 35-36 (1979) (noting the only question in deciding whether to apply probability theory to legal fact-finding is "whether the technique would reduce the number of errors in the fact finding").

[99] "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." FED. R. EVID. 403.

[100] Courts have differed as to whether race or ethnicity can be considered as at least one piece of evidence establishing probable cause. *Compare* United States v. Weaver, 966 F.2d 391, 394 n.2 (8th Cir. 1992) ("As it is, . . . facts are not to be ignored simply because they are unpleasant—and the unpleasant fact in this case is that [the police officer] had knowledge . . . that young . . . black Los Angeles gangs were flooding the Kansas City area with cocaine."), *with* United States v. Montero-Camargo, 208 F.3d 1122, 1132 (9th Cir. 2002) ("The likelihood that in an area in which the majority—or even a substantial part—of the population is Hispanic, any given person of Hispanic ancestry is in fact an alien, let alone an illegal alien, is not high enough to make Hispanic appearance a relevant factor in the reasonable suspicion calculus.").

[101] Just a few of the currently used profiles include: airline highjackers, drug-couriers, alien smugglers, battering parents, serial killers, and those who make school-shooting threats.

not;[102] some create social costs that outweigh their benefits, while others do not.[103]

In summary, when the police in our hijacking hypothetical seek to supplement their information by consulting a hijacker profile, two separate objections may be raised. First, is the profile empirically valid, and second, do the efficiency gains from profiling outweigh the impact that this type of post-September policing imposes on people of Middle-Eastern origin? As to the first consideration, statistical probability evidence, "while neither a panacea nor devoid of problems, is relevant to the truth of asserted facts, and indeed is no less relevant in principle than case-specific evidence."[104] A fifty percent probability of guilt based entirely on statistical information carries with it the same chance of inaccuracy as a fifty percent probability of guilt based on, say, the ability of a flight attendant to recognize and distinguish ten voices. All evidence contains a risk of error; overtly probabilistic evidence simply makes the risk more visible. Thus, a decision to rely on the flight attendant's ability to distinguish voices is no more or less speculative than deciding whether to rely on statistics. The difference between unacceptable speculation and reasonable inference is not a logical distinction, but a legal judgment. Speculation describes a category of doubts that fail to establish probable cause, while reasonable inference describes a category of doubts acceptable within the concept of probable cause.[105]

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[102] For instance, according to one study conducted by the Drug Enforcement Administration, between forty and fifty percent of those identified as drug couriers pursuant to a profile turned out to be carrying either illegal drugs or other evidence connecting them with the illegal drug trade. *See* MONAHAN & WALKER, *supra* note 87, at 226-27 (citing ZEDLEWSKI, THE DEA AIRPORT SURVEILLANCE PROGRAM: AN ANALYSIS OF AGENT ACTIVITIES (1984)). Compare Justice Marshall's criticism of the drug courier profile used in United States v. Sokolow, 490 U.S. 1, 13(1989) (Marshall J., dissenting).

[103] "Reasonable people can differ about the balance, but one could plausibly conclude that the efficiency gains from profiling outweigh the harm" of race-conscious policing. *See* Stuntz, *supra* note 91, at 2179.

[104] Koehler & Shaviro, *supra* note 75, at 278.

[105] "Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." Brinegar v. United States,

As to the second consideration regarding the social costs of profiling, the law has never permitted the quest for factual accuracy to trump all other values; thus, both case-specific and statistical evidence may be excluded for policy reasons. For example, in *Winston v. Lee*,[106] the Court observed that "[a] compelled surgical intrusion into an individual's body for evidence . . . implicates expectations of privacy and security of such magnitude that the intrusion may be 'unreasonable' *even if likely* to produce evidence of a crime."[107] All other policy values being equal, however, there is no reason to favor case-specific facts over statistical evidence such as profiles. Correctly applied, mathematical expressions of probabilities can assist, if not exclusively control, probable cause determinations.

ACCOMMODATING MATHEMATICAL PROBABILITIES AND INTUITIVE APPRAISALS

We live in an uncertain world of probabilities ranging from the possible/probable actions of subatomic quarks to the possible/probable physics taking place below the event horizon of black holes. Our task is to develop strategies for management of uncertainty—in the small universe of the Fourth Amendment—to manage the level of uncertainty surrounding probable cause.

In *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment,*[108] Professor Barbara D. Underwood explained that prediction can be made in a variety of ways, such as by use of individualized judgment based on case-specific facts, or by use of formulas that assign fixed weights to predetermined characteristics of the person matching a profile. Arguments abound for the superiority of either method, and for the extent to which the choice of one method precludes use of the alternative method.

Those who favor individualized assessment would ignore

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338 U.S. 160, 176 (1949).

[106] 470 U.S. 753 (1989).

[107] *Winston*, 470 U.S. at 759 (emphasis added).

[108] Barbara D. Underwood, *Law and the Crystal Ball: Predicting Behavior with Statistical Inference and Individualized Judgment*, 88 YALE L.J. 1408 (1978-79).

available statistical evidence because they prefer to trust the subjective judgment of experienced decision makers who evaluate each individual situation in light of accumulated experience. Such experienced observers may rely on perceptions that they cannot articulate as explicit rules or mathematical probabilities, what Professor Underwood refers to as "the gap between intuitive individualized judgment and statistical inference."[109]

Professor Joseph Grano once offered an explanation of why the law of probable cause should insist on case-specific facts and discount statistical evidence. He posed a hypothetical in which the police could establish, based on case-specific facts, that one of ten people must be guilty of a specific crime. Thus, "for any suspect selected at random from the group, the odds are only ten percent that he is guilty but a whopping ninety percent that he is innocent."[110] Conceding that at first blush ten percent certainty might seem too low for probable cause, Professor Grano suggested that

> [s]uch a probability analysis, however, distorts our perspective. It causes us to overlook the success of the police in narrowing their investigation from the universe of all possible suspects, which may include much of the population, to ten individuals. In a modern, mobile society, this should be seen as a rather significant accomplishment.[111]

He concluded that there is probable cause to arrest each suspect because "[h]aving narrowed the universe of possible suspects to ten, the community would not be unreasonable in requiring all ten, nine of whom are presumably innocent, to sacrifice some liberty or privacy to solve the crime."[112]

Professor Grano then distinguished the arrest of another group of ten based solely on a statistical showing that random searches of people on city streets would show one of ten pos-

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[109] *Id.* at 1429.

[110] Joseph D. Grano, *Probable Cause and Common Sense: A Reply to the Critics of* Illinois v. Gates, 17 U. MICH. J.L. REFORM 465, 496 (1984).

[111] *Id.* at 497.

[112] *Id.*

sesses a concealed weapon or narcotics.[113] Professor Grano maintained that this random search is unacceptable because, "under the [F]ourth [A]mendment, it is one thing to demand some sacrifice of liberty or privacy when suspicion has focused on an individual; it is another to demand such sacrifice when no cause whatsoever exists to believe that the individual, as opposed to anyone else, is involved with crime."[114] I confess that Professor Grano's distinct treatment of these two hypotheticals escapes me, as does his characterization of a ten percent statistical likelihood as "no cause whatsoever." Why is this statistical probability of ten percent any less valid probable cause than the same ten percent likelihood established by case-specific facts?[115] There are other reasons for objecting to random searches, but in assessing likelihoods, one ten percent probability is as good as another.

The strongest argument against random searches is that they resemble the general warrants and writs of assistance that the framers of the Fourth Amendment sought to prohibit.[116] English custom inspectors relied upon general warrants to search whomever and wherever they pleased, but today's government officials might achieve the same result by replacing general warrants with statistical likelihoods that are readily available or easily created. Thus, searches based wholly on statistics could infringe upon the rights of large numbers of innocent people. However, the very nature of probable cause assumes that some innocents must lose their privacy or liberty in order to further law enforcement needs. The proper question is *how many* must surrender their rights, not what type of

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[113] *Id.* at 498.

[114] *Id.*

[115] *Id.* If one of Professor Grano's rationales for upholding the case-specific arrests was to reward police for narrowing "much of the population" to ten suspects, why not reward police for researching statistics and narrowing suspects to those who are on city streets as opposed to those who are on suburban streets or home in bed?

[116] "The drafting process of the Fourth Amendment reinforces the conclusion that suspicionless searches and seizures pursuant to general warrants were the initial and primary evils sought to be prevented." Thomas K. Clancy, *The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizure*, 25 U. MEM. L. REV. 483, 527 (1995).

factual inference or statistical likelihood leads us to demand that surrender, i.e., does it matter whether innocent people lose their liberty because of case-specific facts like driving the same model and color car as the bank robber,[117] or whether they lose liberty because they are walking on public streets that statistics point to as likely to involve certain crimes? The upsetting aspect of arresting on a ten percent likelihood of guilt is that nine innocents are being sacrificed to apprehend one guilty party. These "odds" are equally unacceptable whether the odds are computed on the basis of statistics or case-specific facts. This is best illustrated by retaining Professor Grano's distinct *methods* of determining the odds of guilt in his hypotheticals, but changing the odds themselves. For example, suppose police investigation of specific facts points to one of the ten people as possessing drugs, while random searches of people on city streets would show seven of ten possess narcotics. My choice between these two hypotheticals would be the exact opposite of Professor Grano's choice. I would prefer sacrificing three innocents on the basis of statistics, to sacrificing nine innocents based on the "success of the police in narrowing their investigation . . . to ten individuals."

Whatever the resolution of hypotheticals like Professor Grano's or my hijacking hypothetical, practical considerations are also said to point toward preferring intuitive individualized judgment over statistical inferences. Because few police officers, magistrates, and judges are accustomed to statistical ways of thinking and reasoning, they are likely to experience difficulty in translating relevant evidence (statistical or otherwise) into numerical probabilities. There is always a danger that one's opinions and judgments may be altered when they are restated numerically. Some commentators thus favor what they term

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[117] Insisting on case-specific facts is no guarantee against intrusions on the rights of a great number of innocent people. In *Davis v. Mississippi*, 394 U.S. 721, 722 (1969), the case-specific facts were the rape victim's "description of her assailant . . . [as] a Negro youth." These facts led to the police taking at least twenty-four African-American youths to police headquarters where they were questioned briefly, fingerprinted, and then released without charge. *Davis*, 394 U.S. at 722. The police also interrogated forty or fifty other African-American youths either at police headquarters, at school, or on the street. *Id.*

"intuitive'" decision making strategies that reflect how statistically untrained people actually make decisions. They argue that "intuition'" is internally coherent and preferable to probabilistic logic in the event of conflict.[118]

Recognizing that most police officers cannot express their intuitive judgements in terms of explicit probabilities, however, does not dictate that all logic be abandoned in favor of police consulting entrails and witch doctors when determining probable cause.[119] Even when fact-finders do not make explicit or precise probability estimates about issues, their decisions are often grounded in implicit estimates. For example, in *Delaware v. Prouse*,[120] Justice White relied upon his intuitive appreciation of the likely statistical impact of random automobile stops. He explained that, "[i]t seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed."[121] Similarly, both common sense and statistics tell police that young men commit a hugely disproportionate number of crimes. Police factor this into their assessment of probable cause even if they cannot quote precise percentages.

The crudeness of the intuitive probabilistic determinations currently used to determine probable cause can be improved through use of tools like probability assessment procedures and other mathematical techniques.[122] Police can be expected to improve their assessment of probabilities if they are formally trained in probabilistic appraisal techniques. One frequently

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[118] Koehler & Shaviro, *supra* note 75, at 266.

[119] "The difficulty of practicing an art is no excuse for practicing it stupidly, carelessly." JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 222 (2d prtg. 1950) (1949).

[120] 440 U.S. 648 (1979).

[121] *Prouse*, 440 U.S. 648, 659-60 (1979).

[122] Properly done statistical analyses are hardly less reliable than the intuitions, unfounded assumptions and guesswork on which the courts and police often rely. *See generally* Michael J. Saks & Robert F. Kidd, *Human Information Processing and Adjudication: Trial by Heuristics*, 15 LAW & SOC'Y REV. 123, 146 (1980-81) ("[T]he decision maker whose only tool is intuition will often err . . . . It has been well established for some time now that when the same information is available to intuitive humans or a good mathematical model, the human's decisions are consistently less accurate.").

cited justification for not using statistical evidence at trial is that unsophisticated juries can be misled by pseudo-scientific probability analysis.[123] But unlike juries who come and go with little or no training, police can be familiarized with the proper methods of assessing probabilities. When searches and seizures are based on objectively scored factors such as statistics, whatever may be lost in terms of regard for individual autonomy could be compensated for by an increase in terms of uniformity and neutrality.

If mathematical precision is not always to be preferred over unstructured intuition, at a minimum, mathematical probabilities can supplement traditional methods of assessing probable cause. The practical question that remains is to how often will such statistics be available in the real world of search and seizure. This question surfaced last year in the oral arguments on *Maryland v. Pringle*.[124] More so than any other case, *Pringle* provided the Supreme Court with an opportunity to relate probable cause to mathematical probabilities.

The facts of *Pringle* were fairly straight-forward:

> In the early morning hours a passenger car occupied by three men was stopped for speeding by a police officer. The officer, upon searching the car, seized $763 of rolled-up cash from the glove compartment and five glassine baggies of cocaine from between the back-seat armrest and the back seat. After all three men denied ownership of the cocaine and money, the officer arrested each of them.[125]

The Court of Appeals of Maryland held that "the mere finding of cocaine in the back armrest when [Pringle] was a front seat passenger in a car being driven by its owner is insufficient to establish probable cause for an arrest for possession."[126] The U.S. Supreme Court ultimately upheld the arrest because

> it was reasonable for the officer to infer a common enterprise

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[123] *See* People v. Collins, 438 P.2d 33, 33 (Cal. 1968).

[124] 124 S. Ct. 795 (2003).

[125] *Pringle*, 124 U.S. at 798

[126] Pringle v. State, 805 A.2d 1016, 1027 (Md. 2002), *rev'd* Maryland v. Pringle, 124 S. Ct. 795 (2003).

> among the three men. The quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him.[127]

Although *Pringle* was ultimately decided on the "common enterprise" theory, most of the oral arguments[128] had proceeded on the assumption that only one of the three occupants of the car was guilty. Thus, the arguments explored the question of whether a one in three chance of guilt constituted probable cause. Government counsel argued that probable cause could not be expressed in mathematical terms, while defense counsel's opening argument suggested "this is a unique case with highly unusual facts" which starkly presented probable cause in a numerical fashion. The Court, however, saw it differently: "You make an interesting opening statement that this is highly unusual-we've-a lot of us read a lot of these cases. It seems to me this happens all the time, that drugs in the car, the person says, it's not mine. It seems to me that that's common place."[129]

Not only was the particular factual situation in *Pringle* commonplace, but the availability of statistical probabilities is also much more common than is often realized. Automobile search cases in particular seem to abound with readily available and relevant statistical information. In *Pennsylvania v. Mimms*,[130] the Court was asked to discount case-specific facts and the concept of personal autonomy when ruling on a police practice of ordering all motorists out of their vehicles "as a matter of course whenever they had been stopped for a traffic violation."[131] The Court addressed this uniform practice without inquiring whether the individual police officer had any case-specific information that a particular motorist was likely

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[127] *Pringle*, 124 S. Ct. at 801.

[128] *See infra* text accompanying notes 155-56.

[129] Oral arguments at 32-33, Maryland v. Pringle, 124 S. Ct. 795 (2003) (No. 02-809), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-809.pdf.

[130] 434 U.S. 106 (1977).

[131] *Mimms*, 434 U.S. at 110; *see also* Maryland v. Wilson, 519 U.S. 408 (1997) (permitting police to order all passengers out of the vehicle)

to be armed and dangerous.[132] The Court ultimately concluded that uniform treatment of motorists as a class was justified by statistical evidence "that a significant percentage of murders of police officers occur[] when the officers are making traffic stops."[133] The Court's holding was influenced by one study concluding that approximately thirty percent of police shootings occurred when a police officer approached a suspect seated in an automobile.[134]

In *Michigan Department of State Police v. Sitz*,[135] the Court upheld sobriety roadblocks when informed that approximately 1.6 percent of the drivers passing through the checkpoint were arrested for alcohol impairment.[136] In addition, an expert witness testified at the trial that experience in other states demonstrated that, on the whole, sobriety checkpoints resulted in drunken driving arrests of around one percent of all motorists stopped.[137] When the Court subsequently distinguished *Sitz* in *Indianapolis v. Edmond*,[138] the Court noted that the overall "hit rate" of the program in *Edmond* was reported as approximately nine percent—about five percent of stopped cars in drug checkpoints led to drug arrests and another four percent led to arrests for other offenses.[139]

In *Delaware v. Prouse*[140] a majority of the Court accepted the government's contention that random stops furthered a

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[132] *Mimms*, 434 U.S. at 109. The state conceded that "the officer had no reason to suspect foul play from the particular driver at the time of the stop, there having been nothing unusual or suspicious about his behavior." *Id.*

[133] *Id.* at 110. (citing United States v. Robinson, 414 U.S. 218, 234 n.5 (1973)).

[134] *Id.* at 110.

[135] 496 U.S. 444 (1990)

[136] *Sitz*, 496 U.S. at 455.

[137] *Id.*

[138] 531 U.S. 32 (2000).

[139] *Edmond*, 531 U.S. at 34-35; *see also* United States v. Montoya de Hernandez, 473 U.S. 531, 557 (1985) (Brennan, J., dissenting) (noting one physician's estimate "that he had found contraband in only 15 to 20 percent of the persons he had examined"); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (noting the ratio of illegal aliens detected to vehicles stopped was approximately 0.5 percent, and data established that .12% of those initially stopped and 20% of those referred to a secondary checkpoint were illegal immigrants).

[140] 440 U.S. 648 (1979).

"vital" state interest in promoting highway safety[141] and indicated its willingness to uphold the searches if "in the service of these important ends the discretionary spot check is a sufficiently productive mechanism to justify the intrusion upon Fourth Amendment interests which such stops entail."[142] The state, however, was unable to offer any statistics to prove its claim that random stops are more efficient than the less intrusive checkpoint stops formerly used by the authorities.[143] *Prouse* thus found the state's practice unconstitutional on the basis of the state's inability to demonstrate that the method was "sufficiently productive" in relation to less intrusive but more efficient means of serving the government's purpose.[144]

In addition to automobile cases, statistical evidence is often used to establish the effectiveness of airport screening programs,[145] as well as the reliability of human informants[146] and drug sniffing dogs. For example, *United States v. Limares*[147] held that probable cause was clearly established when the record revealed that the drug sniffing dog had been right sixty-two percent of the time.[148] Even when such precise statistics are unknown or forgotten, there often remains a vague awareness of their general thrust. In one of the most famous cases of our era—the O. J. Simpson case—Professor

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[141] *Prouse*, 440 U.S. at 658-60.

[142] *Id.* at 659.

[143] *Id.* at 658.

[144] *Id.* at 659.

[145] For example,

> [i]n the 15 years the [Government's airport screening] program has been in effect, more than 9.5 billion persons have been screened, and over 10 billion pieces of luggage have been inspected. By far the overwhelming majority of those persons who have been searched . . . have proved entirely innocent—only 42,000 firearms have been detected during the same period.

Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989).

[146] The reliability of informants is often established by citing specific numbers establishing their "track record" of past accuracy. *See, e.g.,* United States v. Shepard, 714 F.2d 316, 317 (4th Cir. 1983) ("[O]n approximately thirty earlier occasions the informant had provided information that had led to over twenty-five convictions.").

[147] 269 F.3d 794 (7th Cir. 2001).

[148] *Limares*, 269 F.3d at 798.

William J. Stuntz suggested that the "officers undoubtedly knew what Justice Department statistics indicate: that half of the women murdered in the United States are killed by their husbands or boyfriends. Simple probabilities made Mr. Simpson a suspect."[149]

In summary, statistical evidence is readily available in many cases and should be utilized whenever it exists. When it is not available, there would be a powerful incentive to discover or create such statistics if the Court announced its preference for statistical evidence over unstructured intuition.[150] As suggested earlier, police could be trained in probability assessment techniques, and this training could include not only how to "think like a statistician," but how to gleam percentages from arrest files and other police records.[151] Creating data banks showing where past efforts have been most and least productive could help establish the probability of guilt in particular types of recurring situations.[152]

If the courts were to accept that mathematical probabilities have a role to play in determining probable cause, the remaining area for consideration is the extent to which the probable cause standard itself should be expressed in mathematical terms.

THE LEVEL OF CERTAINTY—PLAYING BY THE NUMBERS?

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[149] William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transsubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 846 (2001) (quoting Scott Turow, *Policing the Police: The D.A.'s Job*, *in* POSTMORTEM: THE O.J. SIMPSON CASE: JUSTICE CONFRONTS RACE, DOMESTIC VIOLENCE, LAWYERS, MONEY, AND THE MEDIA 189, 189-90 (Jeffrey Adamson ed., 1996).

[150] Illinois v. Wardlow, 528 U.S. 119, 131 n.6 (2000) (Stevens, J., dissenting) ("Statistical studies of bystander victimization are rare. One study attributes this to incomplete recordkeeping and a lack of officially compiled data.").

[151] *Wardlow*, 528 U.S. at 135 n.10 (Stevens, J., dissenting) (noting the United States Department of Justice announced that it would appoint an outside monitor to ensure that New Jersey State Police keep records on racial statistics and traffic stops).

[152] "When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success." United States v. Von Raab, 489 U.S. 656, 675 n.3 (1989).

> The law's principal task is decisionmaking, and decisionmaking takes place in a world of uncertainty. A central and critical task . . . is to specify the degree of certainty or likelihood required to support a particular decision.[153]

Although they turned out to be a mere tease, the oral arguments in *Maryland v. Pringle* dramatically framed the question of expressing probable cause in mathematical terms. When government counsel asserted that a one in three chance of guilt satisfied the probable cause standard, the following exchange occurred:

> Court: Why do we call it probable cause?
> Counsel: I think there's a bit of a misnomer there, but clearly from the case law of this Court, it means a fair probability . . .
> Court: But if you had to reduce it to a percentage figure, what would you call the percentage required for probable cause?[154]
> Counsel: I don't know that I could, Your Honor. I really don't know that it's useful to -
> Court: But it's less than 50, though, I gather?
> Counsel: Yes. Your-the cases of this Court has said -
> Court: So that takes care of the two people in the room, but when you get down to 33-1/3 with three people?
> Counsel: I think-I think three people clearly would be -
> Court: And with four people it would be 25 percent. Is that enough?
> Counsel: Probably, probably. . . .
> Court: . . . [Y]ou agree that at some point the probability is-when the numbers of people present keep increasing, at some point the probability is going to be too slim?[155]

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[153] Clermont, *supra* note 82, at 1117 (footnotes omitted).

[154] When asked to quantify the degree of certainty represented by the phrase "probable cause," 166 federal judges gave, as an average response, 45.78%. C.M.A McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1327 (1982). They also equated reasonable suspicion with a 31.34% level of certainty. *Id.* at 1327-28.

[155] Oral arguments at 14-15, Maryland v. Pringle, 124 S. Ct. 795 (2003) (No. 02-809), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-809.pdf.

At another point the Court stated, "you know, it gets worse and worse," what if there are ten people in a mini-van or bus "so the chance that any individual one did it is ten percent. That's still enough [probable cause]?"[156]

Pushed down that slippery slope by the Court, counsel's only lifeline was the Court's own statements that probable cause could not be quantified.[157] But when the Court states that probable cause resists definition, the Court is not saying that it is logically impossible to attach a probability value to probable cause. The question is not whether the law of probable cause can be precise, but whether it ought to be precise. "Although nothing in probability theory determines the choice of a probability value for probable cause, nothing in the notion of probability prevents the assignment of a specific probability value to the legal requirement of probable cause."[158]

The previous sections of this article focused on the methodology for determining probable cause, (i.e., whether police should utilize statistical studies), and the extent to which police should be encouraged to compile statistical records and to analyze situations in an overtly probabilistic way. At this point, however, the concern is no longer about which methodology, as an empirical matter, will generate the highest degree of certainty. The focus now shifts to the degree of certainty required by the Constitution. As a substantive legal standard, probable cause is independent of the methodology used to assess factual likelihoods.

Unfortunately, the Supreme Court has often confused the method of determining factual likelihoods with the constitutionally required degree of certainty. Consider the definition of probable cause in *Carroll v. United States*:[159] "If the facts and

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[156] *Id.* at 13. Professor Grano once asserted that ten percent was enough to establish probable cause. *See supra* note 112 and accompanying text.

[157] Illinois v. Gates, 462 U.S. 213, 232 (1983) ("[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.").

[158] Peter Tillers, *Intellectual History, Probability, and the Law of Evidence*, 91 MICH. L. REV. 1465, 1484 (1993).

[159] 267 U.S. 132 (1925).

circumstances before the officer are such as to warrant a man of prudence and caution in believing that the offense has been committed, it is sufficient."[160] This definition specifies a methodology for arriving at probable cause—use prudence and caution—but merely describes the ultimate arrival point as a "belief" that the offense has been committed. The question that remains is how strong must that belief be in order to satisfy the constitution?

Meeting that question head-on would require the Court to provide a reasonably precise [perhaps mathematically precise] answer, and at times the Court has acknowledged that the first principle of Fourth Amendment interpretation is that the constitutional standard must be "workable for application by rank and file, trained police officers."[161] As Professor LaFave put it, Fourth Amendment doctrine

> is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."[162]

Formulating rules that are clear in application, however, says little about the substance of those rules. "Don't search on Thursdays" is a clear rule furthering privacy interests; "search all teenagers who are in public after 11 p.m." is a clear rule diminishing privacy. Does the Fourth Amendment have noth-

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[160] *Carroll*, 267 U.S. at 161.

[161] Illinois v. Andreas, 463 U.S. 765, 772 (1983). *Dunaway v. New York*, 422 U.S. 200, 213-14 (1979), held that "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." Departures from such a standard should be adopted, the Court added, reluctantly, and only in "narrowly defined" circumstances. *Dunaway*, 422 U.S. at 213-14.

[162] LaFave, *supra* note 61, at 141 (footnotes omitted).

ing to say about the desirability of these equally clear rules? Once the Court settles on the conditions under which a search or seizure may occur, we would all hope that the Court will be as lucid as possible in defining the contours of such reasonable searches. This is mom and apple pie stuff, and the police do not have a unique perspective in preferring clarity over ambiguity.[163] But if clarity is all that the police want,[164] one very clear rule would be—"when in doubt, don't search"—or at least don't search when the level of doubt drops below an acceptable risk of error.

The problem with quests for clear rules defining probable cause is that

> any attempt to achieve certainty regarding any important constitutional issue is unlikely to succeed and—even if it does succeed in the short run—will inevitably create uncertainty as to more issues than it settles. The process of rendering a decision will tend to distort the issue decided as well as the applicable precedents and doctrines.[165]

Thus, the Court has acknowledged that because so many variables exist in the probable cause equation, "one determination will seldom be a useful 'precedent' for another."[166] In the end, even seemingly "bright-line" rules usually become blurred as the police and the adversarial process test their outer limits, and "[t]he grail of 'rule-oriented' jurisprudence is as mythical as

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[163] "[A] body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that end are stated or are ready to be stated in words." Oliver W. Holmes, *The Path of Law*, *in* COLLECTED LEGAL PAPERS 167, 186 (1920).

[164] Professor LaFave did not advocate clarity as the sole or dominant consideration, but instead argued that clarity plays a role in the calculus of balancing government and individual interests. He suggested that a rule theoretically correct only 95% of the time, but understandable in virtually all cases is preferable to a rule that is 100% theoretically correct, but which police could correctly apply only 75% of the time. Wayne R. LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the "Quagmire,"* 8 CRIM. L. BULL. 9, 30 n.76 (1972).

[165] Craig M. Bradley, *The Uncertainty Principle in the Supreme Court*, 1986 DUKE L.J. 1, 2.

[166] Illinois v. Gates, 462 U.S. 213, 238 n.11 (1983).

King Arthur's."[167]

The inability to formulate clear rules or precise probability levels governing probable cause has lead the Court to adopt one over-arching rule for the police—just use your common sense and act reasonably. In an imperfect world where correct answers are uncertain, a "pragmatic" Court recognizes that it must muddle through to the best of its ability, and that it can hardly ask more from the police. Thus, the Court often determines the constitutionality of police conduct "by resorting to a malleable 'objective' test of reasonableness viewed from the police officer's perspective,"[168] and "any police conduct that is 'understandable' in the circumstances according to common sense [will] be judged 'reasonable' for purposes of assessing the constitutionality of police intrusions."[169]

As formulated in *Terry v. Ohio*,[170] the legal standard becomes whether "the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate."[171] The *Terry* Court was misguided, however, in its suggestion that

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[167] Slobogin, *supra* note 88, at 71.

[168] Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 U.C.L.A. L. REV. 199, 265 (1993); *see also* Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV 473, 477 (1991).

> Although the [F]ourth [A]mendment conveys to "the People [the right] to be secure in their persons, houses, papers, and effects" the reasonableness approach focuses on the acts of the police instead of the rights of the people. The question, then, becomes whether the police acted reasonably rather than whether a person's rights were violated. This approach endorses retrospective evaluations of police behavior rather than prospective protections.

Id. (footnote omitted).

[169] Thomas Y. Davis, *Denying a Right by Disregarding Doctrine: How Illinois v. Rodriguez Demeans Consent, Trivializes Fourth Amendment Reasonableness, and Exaggerates the Excusability of Police Error*, 59 TENN. L. REV. 1, 52-53 (1991); *see also Gates*, 462 U.S. at 232 (stating probable cause "does not deal with hard certainties, but with probabilities. Long before the law of probabilities was articulated as such, practical people formulated certain common-sense conclusions about human behavior; jurors as factfinders are permitted to do the same—and so are law enforcement officers.").

[170] 392 U.S. 1 (1968).

[171] *Terry*, 392 U.S. at 21-22.

a police officer could choose the constitutionally appropriate action by employing a common sense, seat-of-the pants assessment.[172] The crucial mistake in *Terry* was using the word "reasonable" as a term of art synonymous with constitutionality, and at the same time, a description of the searching officer's rational analysis of the situation. By equating reasonableness as a process of logical thought with reasonableness as a standard of constitutionally permissible behavior, the protections of the Fourth Amendment are reduced to a prohibition against irrational police actions. As Justice Stevens charged, the Court acts "on the assumption that the constitutional protection against 'unreasonable' seizures requires nothing more than a hypothetically rational basis for intrusions on individual liberty."[173]

If taken seriously, deference to the reasonably prudent police officer's common sense is "an invitation to reviewing courts to treat a police intrusion as 'reasonable' if any explanation for the police conduct can be given."[174] Admittedly, this approach requires something more than whimsy or caprice by police officers,[175] but even a five percent likelihood that

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[172] Terry's statement regarding a belief "that the action taken was appropriate" is a meaningless generality to the police officer on the street. Wayne R. LaFave, *Street Encounters and the Constitution:* Terry, Sibron, Peters, *and Beyond*, 67 MICH. L. REV. 39, 64 (1968). *But see* Stuntz, *supra* note 91, at 2175. However, Stuntz states that

> [n]o one knows how to craft a legal formula that will tell officers how to behave in advance. That problem, however, need not be solved; vagueness in legal definitions is a more tolerable vice than law professors tend to think. The problem that needs addressing is not definition but application—the question is not whether we can come up with the right legal terminology, but whether police officers can know roughly where the boundaries are in practice. Maybe they can. "I know it when I see it" has a bad reputation in legal circles, but the reputation is undeserved. Sometimes, consider-all-the-circumstances standards work tolerably well in spite of their linguistic muddiness—for all the muddiness, bottom lines may be reasonably predictable.

Id. at 2175.

[173] Maryland v. Wilson, 519 U.S. 408, 422 (1997) (Stevens, J., dissenting).

[174] Davis, *supra* note 169, at 57.

[175] United States v. Montoya de Hernandez, 473 U.S. 531, 543 (1985) (noting customs inspectors had more than an "inchoate and unparticularized suspicion or hunch"). "The clear incentive that operated in the past to establish probable cause

seizable items are present in the place to be searched establishes that the basis for the search is rational and not wholly arbitrary. Allowing police to act on such minimal odds, however, would lead to an unacceptable number of unnecessarily invasive and harassing searches and seizures.[176] The cost to the victims of such unnecessary intrusions is obvious, but the state also has an "economic" interest because "[t]he lower the level of certainty required for a search and seizure, the more state resources will be wasted in conducting it, since more mistakes will occur."[177]

Trusting probable cause determinations to a police officer's common sense also runs contra to the intent of the framers of the Fourth Amendment. Is it plausible they drafted the Warrant Clause and the probable cause requirement merely to insure that the police had some minimally rational basis for exercising their power?

> It seems unlikely the Framers would have accepted that the government can bestow generalized discretionary authority on a police officer through the credential of a metal police badge . . . when they clearly would not have allowed the same officer to be given the same generalized discretionary authority in the form of a paper general warrant.[178]

Most importantly, deferring to the officer's exercise of common sense conflicts with the Court's view of the Fourth Amendment as requiring a delicate balance between the governmental interest and the individual interest in privacy or liberty. Despite the Court's protestations that it balances interests only in

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has now been so completely vitiated that the police need only show that it was not 'entirely unreasonable' under the circumstances of a particular case for them to believe that the warrant they were issued was valid." United States v. Leon, 468 U.S. 897, 957 (1984) (Brennan, J., dissenting) (citations omitted).

[176] Illinois v. Wardlow, 528 U.S. 119, 133 n.8 (2000) (Stevens, J., dissenting) (noting in a two-year period, the "New York City Police Department Street Crimes Unit made 45,000 stops, only 9,500, or 20%, of which resulted in arrest;" "in 1997, New York City's Street Crimes Unit conducted 27,061 stop-and-frisks, only 4,647 of which, 17%, resulted in arrest").

[177] Slobogin, *supra* note 88, at 61 n.196.

[178] Davis, *supra* note 169, at 53 n.203.

"special need" cases,[179] or only where the probable cause standard does not apply,[180] the Court has never explained why it sometimes uses balancing and sometimes uses rigid rules.[181] The Court's vacillation between a rigid definition of probable cause and the ultimate flexibility of balancing has replaced its bipolar approach to the relationship between the amendment's warrant clause and the reasonableness clause.[182] Justice Thomas' recent comment on that legendary schizophrenia can be paraphrased to apply equally to the Court's vacillation on probable cause: "Our cases stand for the illuminating proposition that [probable cause is a uniform standard], except, of course, when [it is] not."[183]

Stripped of qualifiers, modifiers, and outright obfuscation, the true essence of the Court's overall approach is that "'the balancing of competing interests' [is] 'the key principle of the Fourth Amendment.'"[184] Probable cause is but one of many forms or levels of justification for reasonable searches and seizures, and it would be a strange jurisprudence that utilized the balancing of government and individual interests for all constitutional intrusions except those based on probable cause. The very idea of balancing implies that each side has some merit; that some privacy interests outweigh some government interests; and that all forms of privacy cannot be set aside merely because the government offers a modicum of rational justification for the intrusion. Determining which justifications are sufficient for which types of intrusions requires something

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[179] Slobogin, *supra* note 88, at 25.

[180] Dunaway v. New York, 442 U.S. 200, 210 (1979) (stating that because the balancing test of *Terry v. Ohio* "involved an exception to the general rule requiring probable cause, this Court has been careful to maintain its narrow scope").

[181] Silas J. Wasserstrom & Louis M. Seidman, *The Fourth Amendment as Constitutional Theory*, 77 GEO. L.J. 19, 22 (1988) (noting the Court's failure to explain when it balances and when it uses rigid rules).

[182] *See generally* Silas J. Wasserstrom, *The Fourth Amendment's Two Clauses*, 26 AM. CRIM. L. REV. 1389 (1989).

[183] The original statement was: "Our cases stand for the illuminating proposition that warrantless searches are *per se* unreasonable, except, of course, when they are not." Groh v. Ramirez, 124 S. Ct. 1284, 1299 (2004) (Thomas, J., dissenting).

[184] Tennessee v. Garner, 471 U.S. 1, 8 (1985) (quoting Michigan v. Summers, 452 U.S. 692, 700 n.12 (1981)).

other than ostensibly value-free objective rationality on the part of police officers. For example, the police officer in *Tennessee v. Garner* acted rationally, but unreasonably in the constitutional sense, by using deadly force against a non-dangerous fleeing felon.[185] The use of such force was rational because it had been approved by common law and adhered to by a majority of modern police departments.[186] Nonetheless, its use became constitutionally unreasonable in cases involving non-dangerous felons,[187] because the balance was now to be struck in favor of an individual's right to life, which outweighed society's interest in effective law enforcement.

Judicial balancing of the conflicting considerations in *Garner, Terry*, and other Fourth Amendment cases furthers one of the images of how justice is done, i.e., one case at a time, taking into account all the circumstances, and identifying within that context the right outcome—reasonableness under the circumstances.[188] But the reasonable or fair result in a particular case is but one of a number of competing values. Often contradicting the quest for individual justice is the need for equal treatment of similarly situated individuals, the need for comprehensible and stable laws to guide law enforcement officials, and the larger concerns of general society.[189] It is impossible for the Supreme Court to maintain its institutional concern for general principles and to remain totally responsive to the pecu-

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[185] *Garner*, 471 U.S. at 11.

[186] *Id.* at 12.

[187] *Id.* at 11 (stating deadly force may be used only "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force").

[188] The genius of the common law, so the theory goes, was that by sticking close to the facts of the case, the law would grow and develop, not through the pronouncement of general principles, but case-by-case, incrementally, one step at a time. The meaning of the rule emerges, develops and changes in the course of applying it to specific facts.

[189] "[T]he law does undoubtedly treat the individual as a means to an end . . . ." OLIVER WENDELL HOLMES, THE COMMON LAW 35 (Mark DeWolfe Howe ed., The Belknap Press of Harvard Univ. Press 1963) (1881). "[J]ustice to the individual is rightly outweighed by the larger interests on the other side of the scales." *Id.* at 41.

liarities of each case.[190]

Although the Court cannot avoid the dichotomy between uniform application of law and responsiveness to individual situations, between universe and context, between sameness and difference, the Court can achieve an accommodation. The accommodation I suggest is twofold: 1) the fiction of one uniform definition of probable cause must be replaced with a flexible sliding scale that takes account of the severity of the intrusion and the magnitude of the threat; and 2) the amorphous approach of balancing the totality of the circumstances must be replaced with a fixed number of structured categories reflecting multiple layers of probable cause. The goal of this suggested approach is to achieve an appropriate or at least workable blending of flexibility and calibration.

FLEXIBILITY

"Decision theorists insist that the problem of choice always involves *two* questions: (a) What are the odds?, and (b) What's at stake?"[191] We cannot settle on an appropriate level of probable cause [the odds] until we can assess the importance of the interests at stake. On any scale of importance, the interests in the two airplane hypotheticals at the start of this article must be seen as poles apart. Terrorists and illegal smokers are both criminals, but hardly constitute the same threat to society. When computing the odds for probable cause, it seems obvious that a low level of probability should suffice when the stakes involve a terrorist threat. Conversely, we would expect that a high level of probability must be satisfied when the stakes are limited to the possible escape of an illegal smoker.

Despite this obvious truism, the Court often clings to the

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[190] The Court's prime institutional task is to deal with issues of significant public interest, not merely to do justice to the particular parties of the relatively rare case in which certiorari has been granted.

[191] Barbara J. Shapiro, *"Beyond Reasonable Doubt" and "Probable Cause": Historical Perspectives on the Anglo-American Law of Evidence*, 91 MICH. L. REV. 1465, 1486 (1983).

fiction that probable cause is a "single, familiar standard,"[192] and that distinctions among crimes are irrelevant when it comes to regulating criminal investigations.[193] This rigid view of probable cause requires the police to pinpoint their level of certainty to some fixed, but undefined, percentage that applies equally to illegal smokers and terrorists. In contrast to the rigidness of probable cause, the reasonable suspicion standard of *Terry* has evolved into a variable standard, calibrated to the degree of both the privacy intrusion and the state interest. Thus, reasonable suspicion is "not simply a lower standard than probable cause, but a different kind of standard."[194] The flexibility exemplified in the balancing approach of *Terry* is an appropriate model for an expanded definition of probable cause that would take account of the severity of the suspected crime. In Judge Posner's words, "probable cause—the area between bare suspicion and virtual certainty—describes not a point but a zone, within which the graver the crime the more latitude the police must be allowed."[195]

One objection to calibrating the level of probable cause according to the severity of the suspected crime is the difficult timing considerations facing courts and police. At the time most searches and arrests take place, the police do not know

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[192] *Dunaway v. New York*, 422 U.S. 200, 213 (1979), rejected "a multifactor balancing test" of reasonable police conduct under the circumstances, because a "single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront."

[193] In *Brinegar v. United States*, 338 U.S. 160 (1949), Justice Jackson stated that

> we must remember that the authority which we concede to conduct searches and seizures without warrant may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the case of the gravest felonies.

Id. at 182 (Jackson, J., dissenting).

[194] Lerner, *supra* note 13, at 1002.

[195] Llaguno v. Mingey, 763 F.2d 1560, 1566 (7th Cir. 1985) (en banc); *see* Amar, *supra* note 6, at 784 ("To begin with, probable cause cannot be a *fixed* standard. It would make little sense to insist on the same amount of probability regardless of the imminence of the harm, the intrusiveness of the search, the reason for the search, and so on.").

precisely what crime occurred. In contrast, by the time a court rules on the constitutionality of a search, the litigants typically have established the nature of the alleged crime with precision. The contrast between the initially suspected crime and the offense subsequently discovered can be drastic. By way of illustration, consider the following two situations. First, upon hearing loud screams from an apartment, a police officer concludes that someone's life is in immediate danger. He breaks down the door, follows the screams, and finds an uninhibited couple making love. Second, a police officer outside an apartment building detects an odor he believes is the smell of burning marijuana. He rushes into the apartment and finds that the odor comes from a decomposing body. In both situations, the court faces almost unbearable pressure to evaluate the government's justification for initiating the search in light of the facts known at trial.[196] In the latter situation, the court might wish to deter overzealous and faulty investigations of marijuana smoking, but it requires a truly Herculean effort to suppress evidence of a dead body. Conversely, the court might prefer to encourage the first officer's concern for saving lives, but it is difficult to overlook this intrusion into the marital bedroom. Thus, the criticism goes, factoring the severity of crimes into Fourth Amendment jurisprudence would only compound the dangers of hindsight judgment which inhere in the remedy of exclusion of evidence at trial.

Although this criticism is valid, it is not impossible to overcome. Courts routinely struggle with excluding reliable evidence because of legal rules holding such evidence to be inadmissible. For example, evidence that a defendant committed crimes similar to the crime currently charged at trial must be excluded unless some exception applies, such as showing that the previous crimes establish the *modus operandi* used in the current charge. It may be distasteful for a trial judge to exclude

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[196] "[A]fter-the-event justification for the . . . search [is] too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." Beck v. Ohio, 379 U.S. 89, 96 (1964).

a defendant's lengthy rap sheet,[197] but no more or less so than requiring the judge to focus exclusively on what police suspected pre-search, regardless of what we now know. As to the difficulty of police making pre-search evaluations—i.e., asking them to classify cases by the severity of the underlying crime before the details of the crime are known—rough estimates or classifications of suspected crimes are everyday occurrences when police and prosecutors decide where to put their investigative resources. "All police forces and all prosecutors' offices make up-front judgments about the seriousness of alleged crimes."[198] A concept of probable cause that recognizes four or five classes of crimes ranging from the most serious to the least, would not require police or courts to make unmanageably complex judgments.[199]

A more theoretical objection to weighing the severity of the suspected crime is that the Fourth Amendment would become unique in lowering constitutional rights when society's interest is strong.

> For example, the state's admittedly great interest in solving a murder does not permit a relaxation of the right to remain silent, the right to jury trial, the right to counsel, or— most analogous to the subject of the present discussion—the burden of proof; if anything, given the greater consequences that flow from a murder conviction, we are more protective of these rights in homicide cases.[200]

One way to avoid this objection, or at least diminish its impact, is to return to the original concerns that led the *Terry* Court to create a new form of justification and a lower level of certainty

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[197] The exclusion of probative evidence in order to serve some other policy is by no means unique to the Fourth Amendment. Dean Wigmore devoted an entire volume to such exclusionary rules of evidence. *See* 8 J. WIGMORE, EVIDENCE (J. McNaughton rev., 1961) (discussing, inter alia, marital privilege, attorney-client privilege, communications among jurors, state secrets privilege, physician-patient privilege, priest-penitent privilege).

[198] Stuntz, *supra* note 149, at 870.

[199] For example, courts and police would find the following categories fairly easy to distinguish: violent crime; nonviolent, nondrug crime; serious drug crime; and less serious drug crime. *Id.*

[200] Slobogin, *supra* note 88, at 52.

for a seizure. *Terry* focused not on solving past crimes, but on preventing an impending crime and protecting against future harm to a police officer. "[T]he very point of *Terry* was to permit officers to take preventive action and conduct investigative stops *before* crimes are committed . . . . [W]hereas probable cause looks for past or present illegalities, an underlying purpose of *Terry* is to grant officers the ability to prevent future wrongdoing."[201] When future danger is significant, the government's interests expand to include protection of the community as well as solving past crimes.[202]

> The amount of information that prudent police will collect before deciding to make a search or an arrest, and hence the amount of probable cause they will have, is a function of the gravity of the crime, and *especially the danger of its imminent repetition*. If a multiple murderer is at large, the police must compress their investigation and make the decision to search or arrest on less information than if they could investigate at their leisure.[203]

Perhaps the best example of the benefits and pitfalls of distinguishing between past and future harm is the *Sirhan*[204] case in 1968, where society faced a possible terrorist threat, before the word terrorist became a familiar part of our collective consciousness. At approximately midnight on June 4, 1968, Senator Robert Kennedy, a candidate for the Democratic Presi-

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[201] United States v. Perkins, 363 F.3d 317, 326-27 (4th Cir. 2004), *cert. denied*, No. 04-5795, 2005 U.S. LEXIS 544 (2005).

[202] Consider this "thought experiment" posed by Professor George Thomas:

> Suppose the authorities on the evening of September 10 had a choice between foiling the plot and causing the terrorists to flee or arresting all nineteen hijackers after the planes had done their destruction. (I have no idea how this would be possible, but it is only a thought experiment).

George C. Thomas III, *Terrorism, Race and a New Approach to Consent Searches*, 73 MISS. L.J. 525, 536 (2003). Professor Thomas concluded that the dominant purpose should be to protect the public safety even if it meant that no one would be arrested or convicted. *Id.*

[203] Llaguno v. Mingey, 763 F.2d 1560, 1566 (7th Cir. 1985) (en banc) (emphasis added).

[204] People v. Sirhan, 497 P.2d 1121 (Cal. 1972), *overruled by* Hawans v. Superior Court, 586 P.2d 916 (Cal. 1978).

dential nomination, was shot and killed by Sirhan Sirhan.[205] At 10:30 a.m. the next day, police entered Sirhan's house, without a warrant,[206] and "began 'a general search' . . . to determine both 'whether or not there was anyone else involved in [the crime]' and 'whether or not there were any other things that would be relative to the crime.'"[207] In the defendant's bedroom, the police found a diary that was introduced at the trial.[208]

The warrantless "general search"[209] of a private dwelling and the seizure of a personal diary intruded upon the most sacrosanct aspects of privacy. Balanced against these interests were 1) the severity of the crime, and 2) the threat of a nationwide panic that could follow a political assassination. The Supreme Court of California upheld the search because

> [t]he crime was one of enormous gravity, and the "gravity of the offense" is an appropriate factor to take into consideration. The victim was a major presidential candidate, and a crime of violence had already been committed against him. The crime thus involved far more than idle threats. Although the officers did not have reasonable cause to believe that the house contained evidence of a conspiracy to assassinate prominent political leaders, we believe that *the mere possibility* that there might be such evidence in the house fully warranted the officers' actions. It is not difficult to envisage what would have been the effect on this nation if several more political assassinations had followed that of Senator Kennedy. Today when assassinations of persons of prominence have

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[205] *Sirhan*, 497 P.2d at 1126.

[206] *Id.* at 1138.

[207] *Id.* at 1141.

[208] *Id.* at 1138.

[209] The court noted that:

> The scope of the search must, of course, be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible. . . . Even if the exigent circumstances in this case made lawful a warrantless search only for evidence of a possible conspiracy to assassinate prominent political leaders, it is clear from the record that the officers were searching for such evidence. Only a thorough search in the house could insure that there was no evidence therein of such a conspiracy.

Id. at 1141 (citations omitted).

> repeatedly been committed in this country, it is essential that law enforcement officers be allowed to take fast action in their endeavors to combat such crimes.[210]

No one can dispute the court's appraisal of the crime as one of enormous gravity. But solving such a horrendous crime does not necessitate dispensing with a warrant and lowering the level of probable cause to a "mere possibility." The defendant had been caught in the act, gun in hand, in front of a considerable number of eye witnesses. With or without the seized diary, there was little possibility that the defendant would be acquitted. The true justification for the search lies in the Court's recognition of the danger of continuing assassinations of political leaders and the possible ensuing public panic. The *Sirhan* Court took judicial notice that "only two months [before the assassination of Senator Kennedy] Reverend Martin Luther King, Jr., had been assassinated, and less than five years previously the victim's brother, President John F. Kennedy."[211] The court could have also added that the race riots in the Watts section of Los Angeles had occurred within the past three years, and that the summer of 1968 saw increased challenges (violent and peaceful) to the Vietnam War.

Whether one agrees or disagrees with the particular result in *Sirhan*, the court's concern for future harm provides some guidance for resolving our hijacking hypothetical. The thwarted hijacking in our hypothetical did not result in anyone's death, and to that extent the past harm is distinct from the tragic assassination of Senator Robert Kennedy. But the major concern in the hypothetical (as in the *Sirhan* case) is whether these would-be hijackers were an isolated group, or part of a wide-scale attack that might still be unfolding. When imminent damage to society is anticipated, the state may legitimately point to a need for loosening investigative restrictions.

Of course we must guard against overreacting and seeing terrorists plots behind every serious crime. Under current law, because the threatened harm is not an element of the probable

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[210] *Id.* at 1140 (emphasis added).
[211] *Id.* at 1140 n.18.

cause analysis, the government never has to produce any hard proof of alleged threats. Instead, the government often uses veiled suggestions of serious harm, implicitly seeking a generous judicial approach to the government's search and seizure powers. A humorous, but not atypical, example occurred during the oral arguments for *Maryland v. Pringle* when the Court asked whether it would be significant if the seized drugs had been in a locked trunk rather than in the back seat of the car.[212] Counsel responded: "[I]f there had been a large quantity of drugs in the trunk or if there had been a dead body in the trunk . . . ."[213] At least on this occasion, the Court instructed counsel not to speculate in this manner—"Well, let's stick to the five—these five bags that were stuck in a Ziploc bag. The Ziploc bag is in the trunk, not a dead body."[214] Although this was a fairly innocuous illustration, history has multiple examples (ranging from the "communist menace" during the McCarthy era; to the threat of weapons of mass destruction in the post-9/11 era) of the government's tendency to exaggerate and manipulate perceived "threats" as justifications for expanding government power and limiting individual liberty. What we gain from placing threats of future harm within the calculus of probable cause is the opportunity to force the government to produce hard evidence of any perceived threat.

In addition to showing—not merely speculating—that a specific, significant danger exists, the government should have to demonstrate that the danger cannot be averted unless the usual level of certainty is lowered. For example, when the Department of Home Land Defense obtained information of terrorists threats during the 2003 holiday travel season, the country was placed on heightened alert and several flights from London to the United States were cancelled until further investigation could occur. This seems like an eminently sensible and fair way to proceed, and preferable to sacrificing additional

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[212] Oral Arguments at 8, Maryland v. Pringle, 124 S. Ct 795 (2003) (No. 02-809), *available at* http://www.supremecourtus.gov/oral_arguments/argument_transcripts/02-809.pdf.

[213] *Id.* at 9.

[214] *Id.*

passengers' rights as the only response to a possible threat. Lowering the level of certainty required for searches and seizures should be reserved for the most serious and immediate threats when the government has few, if any, alternatives.[215] If the threat is not immediate, then "[a]n alternative to all modes of search is more police work: more interviewing of witnesses, more surveillance, more poring over documents, more informer recruitment, more of whatever police do, other than searching, to solve or create cases."[216] For example, when the only threat of future harm is that a smoker might again smoke in an airplane or other prohibited area, the police can act at their leisure when investigating the case against the suspected smokers.

Focusing on future versus past harm also helps avoid a paradox that has sometimes arisen in the Court's analysis of probable cause. In *Winston v. Lee*, the government sought a court order to remove a bullet from the defendant's body so that a ballistics test of the bullet could tie the defendant to a thwarted burglary.[217] The Court recognized that such an extreme invasion of privacy should not be justified by the relatively low level of certainty required to satisfy ordinary probable cause. Instead, the Court examined whether there was a "compelling need" for the removal of the bullet or whether the prosecution had access to sufficient alternative methods of proving guilt at trial.[218] In effect, the Court created another form and level of probable cause which managed to hook the government on the horns of a dilemma: if the facts were sufficient to establish a high degree of likelihood that the bullet was present in the defendant's body, then these same facts, when presented at trial, could circumstantially establish the location of the bullet. Thus, there was no compelling need to actually remove the bullet. The Court gave full effect to this paradox by

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[215] "[I]ntuitively we agree that less antecedent cause should be required as the need for the police conduct becomes more urgent." Grano, *supra* note 110, at 504.

[216] Steven Duke, *Making* Leon *Worse*, 95 YALE L.J. 1405, 1418 (1986).

[217] Winston v. Lee, 470 U.S. 753, 756 (1985).

[218] *Winston*, 470 U.S. at 765-66. The Court considered whether prohibiting the intrusion would affect "the community's interest in fairly and accurately determining guilt or innocence." *Id.* at 762.

holding that the government's strong circumstantial case without the bullet demonstrated that there was inadequate justification for such an extreme intrusion into the privacy of the defendant's body.[219] The Court turned out to be correct because the defendant was ultimately convicted based on circumstantial evidence.[220] This type of analysis of the likelihood of finding the evidence and the need for the evidence to prove a past crime has only marginal relevance to the separate concern for preventing future harm. For example, the paradox would not exist if the government had compelling circumstantial evidence that a suspect had swallowed a capsule with the names of terrorists planning a future attack, and the government now sought court approval to forcibly extract the capsule.

To return to our hypotheticals once again, if the government has strong circumstantial evidence that a particular passenger is a smoker (e.g., tobacco smell on clothing, cigarette lighter in briefcase, etc.), that evidence can be presented to a jury, and the past crime of smoking on an airplane can be proved without the need to search the passenger's house for additional evidence that he is a smoker. In contrast, no matter how strong the evidence is that a hypothetical terrorist is guilty of attempted hijacking, even a slight indication of a wider terrorist plot might be adequate justification to search his house in order to prevent future terrorists attacks.

In summary, the concept of adequate justification for searches and seizures must be made flexible enough to take account of the severity of the underlying crime, and even more importantly, the severity of the threat of future harm. At some point, the future danger may be so great that lessening constitutional protections might be necessary. As Justice Jackson cautioned in another context, "[t]he choice is not between order and liberty. It is between liberty with order and anarchy with-

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[219] *Id.* at 765. "[A]lthough the bullet may turn out to be useful to the Commonwealth in prosecuting [Lee], the Commonwealth has failed to demonstrate a compelling need for it. We believe that in these circumstances the Commonwealth has failed to demonstrate that it would be 'reasonable' . . . to search for evidence of this crime by means of the contemplated surgery." *Id.* at 766.

[220] *See* Clyde Burrows, *10 Years Given Man with Bullet in Shoulder*, RICHMOND TIMES-DISPATCH, Apr. 24, 1985, at A1.

out either. There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact."[221]

CATEGORIES

It is relatively easy to distinguish the severity of the past crime and the future threat in the two airplane hypotheticals at the start of this article. The difficult task that remains is to draw the line or lines distinguishing and categorizing situations somewhere between these polar extremes. The difficulty of the task inheres in its very formulation because to suggest categories instantly gives rise to the question—how many categories? Two, three, forty?[222] As Professor Amsterdam put it thirty years ago:

> [A]ny number of categories, however shaped, is too few to encompass life and too many to organize it manageably. The question remains at what level of generality and in what shape rules should be designed in order to encompass all that can be encompassed without throwing organization to the wolves."[223]

We can seek guidance on categorization from the experts on the psychology of decision making and from that ultimate legal decision maker-the Supreme Court.

Cognitive psychology examines "how we detect, transform, store, retrieve, and use information from our environment."[224] In *Procedure's Magical Number Three: Psychological Bases for Standards of Decision,* Professor Kevin M. Clermont reflects on experimental investigations which indicate that humans have built-in cognitive limitations, and that most of us can only identify around seven distinguishable categories or a seven

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[221] Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting).

[222] "Using a larger number of categories might reap larger gains, as there are always potential gains from fine-tuning legal rules. . . . It is true that too much fine-tuning can be costly: consistency may suffer, and police may ignore or evade the law if it becomes too complex." Stuntz, *supra* note 149, at 870-71 n.93.

[223] Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 377 (1974).

[224] Clermont, *supra* note 82, at 1134.

point rating scale.[225] In an effort to make sound probability assessments better fit humans, not the impracticable reverse, Professor Clermont has suggested that "the law usually does, realistically can, and optimally should recognize only seven categories of uncertainty in its standards of decision: (1) slightest possibility, (2) reasonable possibility, (3) substantial possibility, (4) equipoise, (5) probability, (6) high probability and (7) almost certainty."[226] With some slight tinkering, those seven categories can be edited down to accord with what I believe are five categories of certainty currently recognized by the Supreme Court.

The initial editing involves discarding two levels of certainty on practical grounds. The first to go is "equipoise" because the police need a standard of decision, not a standard of inaction where they are paralyzed by doubt. Also, as a practical matter, situations where the facts on either side are in exact equilibrium rarely appear in the real world of search and seizure where the police usually deal with vague estimates of probabilities, not mathematical precision. About the only time perfect equilibrium might arise is when and if statistical likelihoods are exactly balanced. But even in such cases there would almost always be case-specific facts that would tip the balance one way or the other. For example, our hijacking hypothetical poses exact equilibrium—a 50/50 likelihood of guilt as to each passenger—but adding facts such as the airline attendant's voice recognition or even something as minor as police observation of which passengers seem nervous, would take the decision-maker off of dead center. In short, the law of probable cause need not concern itself with the largely theoretical concern of how to deal with "equipoise."

The second level of certainty to be discarded is the "almost certain" level. Whether this level is equated with beyond a reasonable doubt or some even higher standard, it really has no place at the preliminary investigation stage. Certainly the framers of the Fourth Amendment never contemplated such a restrictive standard, and the Court has never indicated that it

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[225] *Id.* at 1134-35.
[226] *Id.* at 1156.

might raise the bar to require this level of certainty.

With the elimination of the "almost certain" and "equipoise" levels of certainty, the five remaining categories of uncertainty match up with the Supreme Court's approach, although two of these categories are not acknowledged as such by the Court. At present the Court admits to recognizing three categories of justification for a search or seizure: (1) traditional probable cause; (2) reasonable suspicion; and (3) a balancing of individual and government interests under the general rubric of reasonableness. Although the Court resists the label, there are two other levels of justification for search and seizure: (4) "non-searches" which require no justification;[227] and (5) extreme intrusions into personal liberty such as the use of deadly force[228] or surgical intrusion into the suspect's body,[229] which require the highest level of justification.

Searches Formerly Known as "Non-searches"

A government practice of placing skymarshals on airplanes intrudes on personal privacy to the extent that "big brother is watching" and the passengers have a diminished " right to be let alone, the right most valued by civilized men."[230] The Court, however, deals with such diminimus intrusions by placing them beyond the coverage of the Fourth Amendment, and thus relieves the government of any need to justify its actions. An expansive view of "non-searches" may have been necessary when probable cause was seen as the sole and relatively high standard for all searches and seizures. Under such a monolithic Fourth Amendment, the Court was faced with many cases in which it could either impose a probable cause standard that the government could not meet, or place certain intrusions beyond

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[227] For example, undercover activity, searches of "open fields" and voluntary police-citizen encounters fall into this category.

[228] Tennessee v. Garner, 471 U.S. 1, 3 (1985)

[229] Winston v. Lee, 470 U.S. 753 (1985).

[230] Olmstead v. United States, 277 U.S. 438, 478 (1929) (Brandeis, J., dissenting).

the scope of the Fourth Amendment.[231] However, with a flexible approach to probable cause and with a suggested standard of certainty as low as "slight possibility," these intrusions can be brought within the amendment's scope, where they properly belong.[232]

The question arises as to whether this suggested approach amounts to anything but word play. What do we gain by bringing most "non-searches" within the amendment's coverage if that coverage merely requires a level of justification as low as a slight possibility? In the case of the skymarshals, "search" versus "non-search" may be a distinction without a difference. The potential harm of a skyjacking is so great that lowering the required level of certainty to a "slight possibility" can always be justified.[233] But when the threat is less serious or less immediate, the level of justification can rise accordingly. For example, a one percent chance of skyjacking might justify the use of skymarshals, but when the government wishes to inspect a citizen's garbage for marijuana residue, a ten percent possibility of success might be required. Ten percent likelihood is still quite low, but it exceeds the Court's current approach which holds that government intrusion into garbage is a non-search and thus requires absolutely no justification.[234] Bringing former "non-searches" within the scope of the amendment insures that the police have some rational basis for their actions, and the sufficiency of that rationale (the odds of suc-

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[231] "The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution." Terry v. Ohio, 392 U.S. 1, 11 (1968).

[232] *See* Amsterdam, *supra* note 223, at 393 ("A sliding scale approach would considerably ease the strains that the present monolithic model of the fourth amendment almost everywhere imposes on the process of defining the amendment's outer boundaries.").

[233] "When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness, so long as" the procedures involved are reasonable. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 675 n.3 (1989) (quoting United States v. Edwards, 498 F.2d 496, 500 (2nd Cir. 1974)).

[234] *See* California v. Greenwood, 486 U.S. 35, 37 (1988).

cess) can vary according to the nature of the threat and the degree of intrusion upon privacy or liberty.

Extremely Intrusive Government Action

In addition to bringing former "non-searches" within the amendment's coverage (albeit at the lowest level of required certainty), I also propose open acknowledgment of the highest level of certainty required in extraordinary cases,[235] i.e., recognition that the normal level of probable cause is not sufficient to justify abnormal intrusions. The Court has recognized this principle in connection with police use of deadly force against a suspect[236] and the surgical probing for evidence,[237] situations that "are unusual because of the degree of violence involved in the search or seizure."[238]

Like all other levels of required justification, this highest level should be flexible enough to accommodate extreme threats and extreme measures of protection against such threats. This category might be utilized to help resolve a classic, but again current,[239] quandary for a free society—can torture ever be used to uncover and prevent a threatened mass disaster, for example, the location of a pirated atomic bomb smuggled into the United States by terrorists. The fundamental question of whether torture is ever permissible is not a Fourth Amendment question. Any absolute limitations on balancing individual rights against the collective good are better addressed by due

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[235] *See* Whren v. United States, 517 U.S. 806, 818 (1996) ("Where probable cause has existed, the only cases in which we have found it necessary actually to perform the 'balancing' analysis involved searches or seizures conducted in an extraordinary manner."). Justice Marshall, however, disdained the "extraordinary manner" language, and espoused a much broader view of the flexible nature of probable cause—"[i]t is by now established Fourth Amendment doctrine that increasingly severe standards of probable cause are necessary to justify increasingly intrusive searches." Gooding v. United States, 416 U.S. 430, 464 (1974) (Marshall, J., dissenting).

[236] Tennessee v. Garner, 471 U.S. 1 (1985).

[237] Winston v. Lee, 470 U.S. 753 (1985).

[238] Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment Reasonableness*, 98 COLUM. L. REV. 1642, 1650 (1998).

[239] *See* Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275 (2004); Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201 (2004).

process considerations.[240] But assuming that torture is ever acceptable, we certainly would not permit torturing a suspect based on a slight possibility of some terrorist act. We might, however, act differently when faced with a ninety percent certainty that detonation of the pirated bomb is imminent.

Recognizing this highest level of required certainty is the mirror image of recognizing the lowest level of certainty that should be made applicable to former "non-searches." With these newly recognized bookends in place, we can sandwich in three currently existing standards and create a five tiered model of the levels of certainty required for searches and seizures.

TIERED MODEL OF THE LEVELS OF CERTAINTY REQUIRED FOR SEARCHES AND SEIZURES

The parenthetical numbers following each category are largely arbitrary and necessarily vague, but they help give some level of concreteness to what might otherwise be an overly theoretical model. At a minimum, such numbers place the hierarchy of these categories beyond dispute.[241]

1) Slight possibility	(1% to 10%)
2) Reasonable suspicion	(20% to 40%)
3) Fair probability	(40% to 49%)

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[240] *See* Chavez v. Martinez, 538 U.S. 760, 773 (2003) ("The Fourteenth Amendment's Due Process Clause, rather than the Fifth Amendment's Self-Incrimination Clause, would govern the inquiry in those cases" involving "police torture or other abuse that results in a confession."); Rochin v. California, 342 U.S. 165, 172-74 (1952) (noting evidence obtained by methods that are "so brutal and so offensive to human dignity" that they "shock the conscience" violate the Due Process Clause).

[241] For example, when watching an Olympic diving event, I might disagree with the judges whether a particular dive merited an eight rather than a nine, but at least there is no uncertainty that eight is lower than nine. The Court, however, sometimes confuses the hierarchical relationship between belief and suspicion. *See supra* text accompanying note 53. In general, the Court has shown a disturbing tendency to coin a new phrase (e.g., non-whimsical suspicion, clear indication, etc.) to resolve each new or difficult factual situation. "[C]ourts should clear up their domains where the decision makers cannot tell which standard prevails or what the prevailing standard means." Clermont, *supra* note 82, at 1151.

4) More likely than not (51%)[242]
5) High probability (80% to 100%)

CONCLUSION

My examination of mathematical definitions of probable cause has been less of a tease than the oral arguments in *Pringle*, although I do stop short of endorsing precise mathematical expressions of probable cause. Too much precision diminishes the resources of ambiguity, and as Aristotle cautioned, "[w]e must not look for the same degree of accuracy in all subjects; we must be content in each class of subjects with accuracy of such a kind as the subject matter allows."[243]

In some settings, the required level of certainty can be expressed with a fair amount of mathematical precision. For example, the law could specify whether a drug sniffing dog must have an established track record of reliability in the 30%, 40%, 50% range, and so on. But in the absence of a precisely measured track record, "in the ordinary task of unaided categorization of amorphous probability . . . we can at best make little more than an imprecise stab at judgment."[244] In recognition of human cognitive limitations, these stabs at judgment should be limited and structured into manageable categories of probabilities. Five such categories may or may not be the magic number, but they are preferable to the unacceptable complexity of balancing the totality of the circumstances,[245] or the other

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[242] Professor LaFave grudgingly conceded that some arrests could be made on less than a fifty-one percent probability, i.e., the classic hypothetical where police encounter a dead man and two bystanders who each accuse the other of murdering the victim. He insisted, however, that if the police were permitted to arrest "upon a less than 50% probability that a crime has even occurred, then this would open up the possibility that police would generally arrest persons engaged in activity which was only equivocal," a practice that would result in many intrusions into the freedom and privacy of innocent persons. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE—A TREATISE ON THE FOURTH AMENDMENT § 3.2(e) (3d ed. 1996).

[243] FRANK, *supra* note 119, at 194 (quoting Aristotelian lines).

[244] Clermont, *supra* note 82, at 1146.

[245] "The factors in the balancing test have become mere shells, manipulated to justify unguided conclusions as to what the majority in any given case concludes is reasonable." Clancy, *supra* note 116, at 585.

extreme of a "one size fits all" approach to probable cause.[246] "While the Court has never embraced a case-by-case sliding scale of probable cause, it has implicitly adopted a category-by-category sliding scale."[247]

In summary, my view of the flexible nature of probable cause rests on a string of theoretical and pragmatic acknowledgments: probable cause must be seen as but one form of justification for searches and seizures; all justifications reflect compromises that resolve conflicting government and individual interests; the same compromise is not mandated in all cases; thus, the required degree of certainty becomes a flexible standard that is part of the balance or compromise itself.

Given the countervailing needs for both clarity and calibration, for rules and standards, a categorical proportionality approach to probable cause will not arrive at many "bright line" rules. My five-tiered approach to the levels of certainty required for searches and seizures draws a line that is obviously subject to attack[248] (or further refinement). But by adjusting the odds to reflect the varying interests at stake, perhaps we can make the best possible gamble—one in which both sides win.

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[246] "Still, whatever the best possible regime is, it seems hard to believe that the current approach—one category for all crimes—makes sense." Stuntz, *supra* note 149, at 870 n.93.

[247] Thomas, *supra* note 202, at 531.

[248] "[I]t is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones." United States v. Banks, 540 U.S. 31, 36 (2003).

THE FOURTH AMENDMENT AND THE FALLACY OF COMPOSITION: DETERMINACY VERSUS LEGITIMACY IN A REGIME OF BRIGHT-LINE RULES

Donald A. Dripps[*]

The language of the Fourth Amendment is among the most spacious in the Constitution.[1] This poses two profound challenges for courts obligated to interpret those spacious words. One challenge is legitimacy; courts are not supposed to legislate, and yet in this instance the plain meaning of the text incorporates norms of reasonableness by reference. The second challenge is determinacy; given the volume of search-and-seizure activity and the unappetizing suppression remedy, judges[2] and commentators[3] alike have recognized the impor-

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[*] Professor, University of San Diego School of Law; B.A. Northwestern, 1980; J.D., Michigan, 1983. My thanks to Tom Clancy and The National Center for Justice and the Rule of Law at the University of Mississippi; this article benefitted greatly from the comments of both fellow panelists and conference participants.

[1] *See, e.g.,* Anthony Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 395 (1974) (stating that Fourth Amendment's "language is no help and neither is its history.").

[2] *See, e.g.,* Thornton v. United States, 124 S. Ct. 2127, 2132 (2004) (noting the "need for a clear rule, readily understood by police officers"); Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) ("[W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review."); United States v. Robinson, 414 U.S. 218, 234-35 (1974) (expressing reluctance to review police arrest and search decisions on an individual basis).

[3] *See, e.g.,* Amsterdam, *supra* note 1, at 378-391 (1974); Wayne R. LaFave, *"Case by Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma,* 1974 S. CT. REV. 127, 141; DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT AND FUTURE OF CONSTITUTIONAL CRIMINAL

tance of supplying police, prosecutors and lower courts with workable, clear-cut doctrine.

Roughly speaking, by determinacy we mean that a high percentage of informed observers would agree on the law's application to particular facts.[4] Roughly speaking, by legitimacy we mean that decisions rest on "reasons that in their generality and their neutrality transcend any immediate result that is involved."[5]

My thesis is not a happy one, for it holds that Fourth Amendment determinacy, with the attendant need for bright-line rules, stands in serious tension with Fourth Amendment legitimacy—the need to base the content of the bright-line rules on conventional sources of constitutional law rather than the personal preferences of judges who happen to be in the majority in any given case. We want determinate bright-line rules to guide the police, and we want these rules to follow from a fair reading of text, history, and precedent. But legitimate Fourth Amendment doctrine is prone to indeterminacy,

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PROCEDURE 155-59 (2003).

[4] The claim that *no body of legal doctrine* is determinate has generated considerable debate. *See, e.g.,* Jules L. Coleman & Brian Leiter, *Determinacy, Objectivity, and Authority*, 142 U. PA. L. REV. 549 (1993). I am concerned here not with the question of whether the authoritative legal materials justify a unique result in hard cases, but in the more practically important question of whether doctrine once announced effectively guides decisions at lower levels in the legal hierarchy.

[5] Herbert Wechesler, *Toward Neutral Principles of Constitutional Law,* 73 HARV. L. REV. 1 (1959). Wechsler's discussion deserves at least this further quotation in the footnote:

> The courts have both the title and the duty when a case is properly before them to review the actions of the other branches in the light of constitutional provisions, even though the action involves value choices, as invariably action does. In doing so, however, they are bound to function otherwise than as a naked power organ; they participate as courts of law. This calls for facing how determinations of this kind can be asserted to have any legal quality. The answer, I suggest, inheres primarily in that they are—or are obliged to be—entirely principled. A principled decision, in the sense I have in mind, is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved.

Id. at 19.

and determinate doctrine is prone to illegitimacy. In defending this claim, I shall focus on one significant, and, in my view, representative, area of doctrine—the scope of the so-called warrant requirement.

The Warren Court's criminal procedure revolution, which imposed the Fourth Amendment exclusionary rule on the states, bequeathed to the Burger Court a body of pre-incorporation precedent that the Burger Court accepted as presumptively legitimate. At the heart of the pre-*Mapp* Fourth Amendment jurisprudence was the warrant requirement, the principle that, absent prior judicial authorization, searches and seizures were constitutionally unreasonable *per se*, subject to few carefully defined exceptions.[6]

The dimensions of the warrant requirement, however, urgently call for clear definition. When the police search or arrest without probable cause, the Constitution forbids the search—and it is rather unlikely that the police *ever could have* executed the search or arrest in compliance with constitutional requirements. By contrast, when the police violate the Fourth Amendment when they have probable cause but don't have a warrant, the fruits of the search typically could have been secured for the benefit of the public if only the police had known that the law required a warrant. Forced to give priority either to then-prevailing ideas of legitimacy or to the pragmatic need for determinacy, the Burger Court, after a long struggle, surrendered legitimacy in favor of clarity.[7]

From the standpoint of determinacy the Burger Court's turn to bright-line rules was reasonably successful. Determinacy, however, came at a price in legitimacy. The basic methodology of balancing, which runs through the Burger Court's Fourth Amendment cases, is essentially legislative in form.

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[6] *See* James J. Tomkovicz, California v. Acevedo: *The Walls Close in on the Warrant Requirement,* 29 AM. CRIM. L. REV. 1103, 1105 (1992) ("Since the 1960s, at least, large majorities of the Court had consistently proclaimed that 'warrantless searches are per se unreasonable'—subject, of course, to exceptions. While the exceptions at times seemed destined to swallow the rule, the rule itself seemed relatively safe—almost untouchable.") (footnotes omitted).

[7] *See infra* text accompanying notes 37-251.

One might argue that in this case, constitutional text delegates this sort of rule-making authority to the courts (a position I myself endorse)[8], but if one were to design an analytical framework for the very purpose of provoking the charge of legislating from the bench, you could not do much better than a framework that calls upon courts to issue rules based on a balancing of interests.

The troubling subjectivity of interest-balancing did not induce a political outcry, probably because the Court was balancing interests with a thumb on the scales in favor of law enforcement. However, it did induce a reaction within the Court itself. Justice Scalia, rebelling against the subjectivity of rule-making based on interest-balancing, argued that the Court should consult founding-era common-law practice as a guide to Fourth Amendment interpretation.[9] Of late, majori-

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[8] For a classic statement of this view, see Amsterdam, *supra* note 1, at 399:

> What we do know, because the language of the fourth amendment says so, is that the framers were disposed to generalize to some extent beyond the evils of the immediate past. No other view is possible in light of the double-barreled construction of the amendment. The second clause, requiring probable cause and particularity in the issuance of warrants, was alone quite sufficient to forbid the general warrants and the writs of assistance that had been the exclusive focus of the pre-constitutional history. But the framers went further. They added . . . a wide provision that the people should be secure in their persons, houses, papers and effects against unreasonable searches and seizures. . . . Nor do I see a reason to conclude that the framers intended the fourth amendment, any more than the rest of the Bill of Rights or the Constitution, to state a principle like the dwarf in Gunter Grass' *Tin Drum*, who suddenly and perversely decided to stop growing because growth was what grownups expected of him.

Id. (footnote omitted).

[9] Justice Scalia's early Supreme Court opinions in Fourth Amendment cases took a quite conventional approach, applying an established yet judge-made doctrine to the issues presented. *See, e.g.,* Arizona v. Hicks, 480 U.S. 321 (1987). For the story of Justice Scalia's turn to the common law, see David Sklansky, *The Fourth Amendment and Common Law,* 100 COLUM. L. REV. 1739, 1745-61 (2000). I greatly admire Sklansky's article, but I reject his supposition that the turn to the common law was inspired by Justice Scalia's "desire for clarity and stability." *Id.* at 1750. In my view, Professor Sklansky confuses clarity with consistency, when inconsistent rules can be quite clear. For example, to deny police authority to search a container in the passenger compartment of a car absent probable

ties of the Court have deployed this common-law methodology in some major cases,[10] but in other cases followed precedents applying or interpreting Court-made rules based on modern views of reasonableness.[11]

If the Rehnquist Court has substituted common-law tradition for *Boyd*-vintage federal precedents and the judicial sense of community values as the test of legitimacy, this Court has not yet found a way to reconcile legitimacy with determinacy. Determinacy poses an acute challenge to those who would predicate legitimacy on common-law history. The obvious fact is that the common law did not generate bright-line rules, but rather applied general principles to particular facts in tort cases against government officers. These principles of tort liability were often expressed in different, sometimes contradictory, ways by the common-law authorities. They were always subject to legislative modification by Parliament.

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cause, United States v. Ross, 456 U.S. 798, 799 (1982), but to grant such authority without any suspicion whatever so long as someone in the car is placed under arrest, New York v. Belton, 453 U.S. 454, 457 (1981), can fairly be faulted for inconsistency. The distinction between the *Ross* rule and the *Belton* rule, however, is relatively *clear*. Indeed it is the very clarity of the two rules that invites the police to circumvent one by triggering the other. My supposition is that, consistent with the views developed in ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997), Justice Scalia was troubled less by the uncertainty than by the illegitimacy of the Fourth Amendment rules crafted by the Court in the decades before he joined it.

[10] *See* Sklansky, *supra* note 9 at 1760. The common law has played a prominent role in the Court's opinions in United States v. Banks, 540 U.S. 31 (2003); Atwater v. City of Lago Vista, 532 U.S. 318 (2001); Wilson v. Arkansas, 514 U.S. 927 (1995). The Court relied on Founding-era legislation in *Wyoming v. Houghton*, 526 U.S. 295, 302 (1999) (holding that *Ross* rule extending automobile exception to warrant requirement to all containers within the vehicle that could hold the suspected item also applies to personal effects of passengers).

[11] *See* Illinois v. Lidster, 124 S. Ct. 885, 888-91 (2004) (upholding highway roadblock after hit-and-run accident; no discussion of common law); Kirk v. Louisiana, 536 U.S. 635, 635-38 (2002) (per curiam) (applying *Payton* rule requiring warrant for entry of residence to make arrest; no discussion of the common law); United States v. Drayton, 536 U.S. 194, 197-208 (2002) (finding no seizure of bus passengers questioned by police; Court applies *Florida v. Bostick*, 501 U.S. 429 (1991) without discussing common law); Bd. of Educ. v. Earls, 536 U.S. 822, 828-38 (2002) (upholding suspicionless drug testing of students involved in extra-curricular activities against Fourth Amendment challenge; Court applies balancing test without discussing common law).

The institutional, legal and remedial differences between the eighteenth and twenty-first centuries make it difficult to draw any but predetermined analogies between the search-and-seizure law of the two periods. The historical turn therefore adds little to the legitimacy of judicial decisions in this area; history controls only after today's judges make a long sequence of contemporary judgments about what counts as history. History, at this level of particularity, could control decisions only if we are willing to overthrow the very foundations of the current Fourth Amendment regime—the substitution of abstract ideals of privacy and liberty for the common law tort categories of trespass and false imprisonment, the articulation of doctrine as bright-line rules rather than tort-type standards, and reliance on the exclusionary rule rather than tort actions for enforcement.

This the Court seems unwilling to do.[12] Yet deriving specific rules from specific common-law practices detaches common-law practice from its context. Perhaps worse, identifying the rule by reference to how the common-law judges understood the police practice at issue detaches the contemporary rule announced by the Court from *its* context—a web of other court-made Fourth Amendment rules, each with its own arbitrary margins. To adopt an evolutionary simile, transplanting selected common-law practices into the current constitutional criminal-procedure regime is like doing a skin graft from a zebra to a horse.

Determinacy is also in tension, albeit a more manageable tension, with understandings of legitimacy based on contemporary social norms.[13] All rules are arbitrary in some of their

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[12] *See, e.g., supra* note 10 and accompanying text.

[13] Much modern doctrine reflects the shared-values perspective. A conspicuous example is the *Katz* test that asks whether the citizen had a subjective expectation of privacy that society deems reasonable. *See, e.g.,* Kyllo v. United States, 533 U.S. 27, 34 (2001) (holding that reasonable expectation of privacy exists against use of thermal-imaging device to reveal heat sources inside private home); California v. Greenwood, 486 U.S. 35, 40 (1988) (finding no reasonable expectation of privacy in discarded garbage). The shared-values perspective also informs a strong strand in the legal literature. *See, e.g.,* Amsterdam, *supra* note 1. Some scholars have sought to give the idea of contemporary reasonableness more ana-

applications, and rules surely are a desirable feature in Fourth Amendment jurisprudence. Here the problem is not that of grafting selected tidbits of common-law practice into a profoundly different legal context. Rather, from the shared values perspective the problem is that the intersection of the rules can produce unexpected consequences, very much at odds with the purported justifications of the rules.

In his *Sophistical Refutations*, Aristotle described what has come to be known as the fallacy of composition, *i.e.*, confusing the distributive and collective senses of a class.[14] He gives several examples. A sitting man can walk, and a walking man can stand; ergo a man can walk and sit at the same time.[15] A man can carry each of several burdens; ergo he can carry all of them at once.[16] I shall argue that the Supreme Court has committed this logical error in both of the ways it lately has sought to respond to the challenges of legitimacy and determinacy.

To be concrete, it is not unreasonable to say that, official motive should play no role in Fourth Amendment law. It is not unreasonable to say that, incident to a lawful arrest of a motorist, the police may search the passenger compartment of the vehicle, containers included. It is not unreasonable to say that the police may make a custodial arrest for any criminal offense, traffic included. But to say that there shall be no inquiry into the motives of police who make custodial arrests for exceeding the speed limit by four miles per hour and then

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lytical rigor than either a naked appeal to intuition or a survey-type assessment of popular opinion. *See* Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751, 1811 (1994) (proposing turn to metaphor of citizen/government trust to guide Fourth Amendment adjudication); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment,* 44 STAN. L. REV. 553, 556 (1992) (explaining Court's "special needs" cases as situations in which reasonable citizens would agree to the government's search policy rather than invite alternative policies which, although legal, would make the search victims worse off).

[14] Aristotle, *On Sophistical Refutations, in* ON SOPHISTICAL REFUTATIONS; ON COMING-TO-BE AND PASSING AWAY; ON THE COSMOS 21 (E.S. Forster & D.J. Furley trans., Harvard Univ. Press 1955).

[15] *Id.*

[16] *Id.*

peruse every file in a laptop computer found in the backseat of the vehicle is more than a little like saying that a man can sit and walk at the same time. This state of affairs, moreover, should be just as disturbing to those who predicate legitimacy on history as to those who predicate it on contemporary norms of reasonableness. The *bete noir* of the founders was the practice of general searches by government agents insulated from tort liability. The Court's automobile cases countenance this very practice.

Part I describes the Supreme Court's turn to bright-line rules during the days of the Burger Court. Part II takes a closer look at Burger Court doctrine with respect to when the police are required to obtain warrants with respect to citizens outside of private premises, principally on the road. The Court at this point understood the warrant requirement as an established feature of legitimate constitutional law, but came to subvert that so-called requirement for the sake of a determinate jurisprudence to govern a high volume of litigation. Part III explains how the Rehnquist Court, while purporting to shift the criterion of legitimacy from shared values to common-law pedigree, likewise, has given priority to determinacy at the expense of legitimacy.

Part IV makes a fairly banal point—that current Fourth Amendment law conditions automobile usage—the dominant mode of personal transportation, both for local and for interstate travel—on liability to arrest and search at the whim of the police. This result is at odds with any criterion of legitimacy known to Fourth Amendment caselaw or, to my knowledge, commentary. Indeed, just this past term, in *Thornton v. United States,* several of the justices themselves expressed their disquiet with the scope of the power to search automobiles incident to arrest without probable cause, let alone a warrant.[17]

What I claim to add to the general disquiet over the scope of police powers over motorists is to locate the roots of the le-

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[17] *See* Thornton v. United States, 124 S. Ct. 2127, 2133 (2004) (O'Connor, J., concurring); *see also id.* (Scalia, J., concurring).

gitimacy deficit in the felt necessity of determinacy, and more particularly, in the intersection of the various rules adopted by the Court. The legitimacy deficit is partly the product of the Court's unfortunate historical turn, and partly the natural tendency of overinclusive rules, leveraged together, to yield all-inclusive rules.

The Court, I suggest, has little hope of working out a corpus of Fourth Amendment law that reconciles legitimacy with determinacy so long as it persists in the project of surgically removing a rule of the common law, and then surgically grafting the same onto the body of modern doctrine. Yet even a methodological focus on widely-shared contemporary values to generate particular rules out of particular cases runs a troubling risk of perverse synergy. Part V acknowledges the difficulty of the problems posed by the Fourth Amendment's capacious language, and suggests a number of strategies for dealing with the emerging problem posed by the interaction of rules generated through the process of adjudication.

I. Fourth Amendment Challenges and Doctrinal Responses: A Preliminary Overview

As it was in Bordeaux, so it was in constitutional criminal procedure; the year of the century was 1961. That year saw the landmark decision in *Mapp v. Ohio*,[18] imposing against the states not just the Fourth Amendment (which had been part of Fourteenth Amendment due process, at least in theory, since 1949)[19] but the exclusionary remedy as well.[20] *Mapp* had dramatic consequences, both for the search-and-seizure practices of state and local police, but also for the body of Fourth Amendment law fashioned by the Supreme Court in federal cases up to that time.

Mapp changed the subject matter of Fourth Amendment law along at least three dimensions. First, the sheer scale of

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[18] 367 U.S. 643 (1961).

[19] *See* Wolf v. Colorado, 338 U.S. 25 (1949), *overruled by Mapp*, 367 U.S. at 653.

[20] *Mapp*, 367 U.S. at 655.

activity regulated by Fourth Amendment jurisprudence grew overnight by, roughly speaking, an order of magnitude. State and local police did then, and still do, the great majority of the nation's law enforcement.[21] Doctrine that once applied only to those few cases investigated by the FBI and the Treasury Department now applied to the Chicago police and the Tallageda County Sheriff's office.

Second, not only did the Fourth Amendment's coverage grow dramatically in scope, it also changed its character. The traditional felonies are typically state offenses. Doctrine that once constrained the enforcement of the revenue and narcotics laws now constrained the enforcement of laws against murder, rape and robbery.[22]

If a vastly larger and significantly more urgent docket of Fourth Amendment cases now reached the courts, a final important change had to do with the peculiar character of the exclusionary rule. It was the only instrument available to the judicial hand that might have enforced the Fourth Amendment as a practical matter, but suppression "rubs our noses" in the fact that limiting police authority necessarily enables dangerous wrongdoers to escape their just deserts.[23] One index of the degree of change incorporation entailed was the Warren Court's refusal to give *Mapp* retroactive effect; retro-

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[21] As Professor Stuntz points out, even after decades of growth in federal law enforcement responsibility, "while local police have primary responsibility for the mass of crime control, FBI agents have primary responsibility for very little." William J. Stuntz, *Terrorism, Federalism, and Police Misconduct,* 25 HARV. J.L. & PUB. POL'Y 665, 673 (2002).

[22] The pre-*Mapp* federal cases typically involved prohibition or narcotics. *See, e.g.,* Walder v. United States, 347 U.S. 62 (1954) (narcotics); Olmstead v. United States, 277 U.S. 438 (1928) (involving liquor), *overruled in part by* Katz v. United States, 389 U.S. 347 (1967), and Berger v. New York, 388 U.S. 41 (1967); Agnello v. United States, 269 U.S. 20 (1925) (involving cocaine); Carroll v. United States, 267 U.S. 132 (1925) (involving liquor). Post-*Mapp* cases brought more prosecutions for more violent crimes into the Court's docket. *See, e.g.,* Minnesota v. Olson, 495 U.S. 91 (1990) (involving murder, armed robbery and assault); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (involving murder); Terry v. Ohio, 392 U.S. 1 (1968) (involving carrying a concealed weapon).

[23] The metaphor originated in John Kaplan, *The Limits of the Exclusionary Rule,* 26 STAN. L. REV. 1027, 1037 (1974).

active application would have opened the prison gates to no apparent purpose. Even a liberal majority was disturbed by the prospect of recasting law-enforcement across the country in the federal mold, especially if this was to be accomplished by the exclusion of reliable evidence.

The scope of the differences between the state and federal dockets at the time of *Mapp* had another corollary; the federal law had not been designed with state cases in mind. Federal agents did not do much in the way of routine patrol. A state's attorney or a police administrator who wanted to know the scope of police power to detain for investigation or to search incident to arrest—the two most common incidents of seizures and searches respectively—could not have found much guidance in the pages of the United States Reports. The stop for investigation was a novel problem to the Court that decided *Terry v. Ohio*.[24] There was a line of pre-*Mapp* search-incident cases, but they conflicted with one another to such an extent that they were cited as examples of how confused and uncertain the Court's Fourth Amendment law had become.[25]

The situation placed the police in a difficult situation. They were called upon to conform to legal standards under circumstances when good lawyers disagreed about what those uncertain standards required; and police who guessed wrong jeopardized the public safety by triggering the exclusionary rule. Anthony Amsterdam, certainly no right-winger, called

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[24] As Chief Justice Warren's law clerk for the *Terry* litigation later remarked:

> I recall not being surprised by the vote to affirm in *Terry*, though I was taken a bit aback by its initial unanimity. (Justice Douglas voted at first with the majority but later changed his vote.) This unanimity, I soon learned, masked an almost complete lack of consensus about just *how* simultaneously to recognize and to cabin this new police authority. The Court's fumbling effort to find a satisfactory solution to this problem, and the evident difficulty of that effort, are for the most part plain on the face of the published opinions.

Earl C. Dudley, Jr., Terry v. Ohio, *the Warren Court and the Fourth Amendment: A Law Clerk's Perspective*, 72 ST. JOHN'S L. REV. 891, 893-894 (1998).

[25] *See* Chimel v. California, 395 U.S. 752, 755 (1969) ("The decisions of this Court bearing [on the permissible scope of search incident to arrest] have been far from consistent, as even the most cursory review makes evident.").

upon the Court to conceive of the Fourth Amendment as a vehicle for regulating the police, rather than, as it stood before *Mapp*, as a guarantee of a zone of personal privacy that trumped collective considerations of public security.[26] The Burger Court, which assumed the responsibility of Fourth Amendment adjudication about the same time as Amsterdam's famous Holmes Lectures, was, to put it as blandly as possible, somewhere to the right of Professor Amsterdam.

A working majority of the Burger Court undertook a three-pronged offensive in support of the police. At the level of definition, the Court frequently abdicated the role of regulating the police by declaring the challenged investigative technique as something other than a search or a seizure.[27] At the level of remedying infractions, the Court recognized a long list of exceptions to the application of the exclusionary rule.[28] In between—in the area of police behavior covered by the Fourth Amendment and enforced by the exclusionary rule—the Court worked hard (and surprisingly successfully) to define Fourth Amendment doctrine in the form of bright-line rules.[29] Police

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[26] *See* Amsterdam, *supra* note 1, at 367 (contrasting "regulatory" and "atomistic" views of the Fourth Amendment and urging judicial adoption of the regulatory perspective).

[27] *See, e.g.*, United States v. Place, 462 U.S. 696, 707 (1983) (holding that a dog sniff for narcotics was not a search); Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (holding that police use of pen register was not a search); United States v. White, 401 U.S. 745, 754 (1971) (holding that an electronic recording of suspect's conversation with undercover agent was not a search); Thomas K. Clancy, *What Does the Fourth Amendment Protect: Property, Privacy, or Security?*, 33 WAKE FOREST L. REV. 307, 316-36 (1998) (describing the shift from property to privacy based understanding and subsequent curtailment of privacy conception).

[28] *See, e.g.*, United States v. Leon, 468 U.S. 897, 926 (1984) (holding that exclusionary rule does not apply to evidence obtained by police who execute a warrant unsupported by probable cause, absent police perjury in application, a magistrate not acting neutrally, or application so lacking in indicia of probable cause that no well-trained officer would believe the warrant to be lawful); United States v. Havens, 446 U.S. 620, 627-28 (1980) (holding that illegally-seized evidence was admissible to impeach defendant's testimony, even when government elicited the testimony to be impeached on direct examination); United States v. Janis, 428 U.S. 433, 459-60 (1976) (holding that exclusionary rule does not apply in civil proceedings, forfeiture excepted).

[29] *See, e.g.*, County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) (setting presumptive forty-eight hour limit on detention following warrantless arrest with-

who violate clear limits, the sentiment seemed to be, have only themselves to blame.

Liberal critics objected to the narrow understanding of "searches and seizures" and to the exceptions to the exclusionary rule.[30] They accepted, however, the broader idea that the Fourth Amendment called upon the Court to implement its general purposes by making (as in "make up") Fourth Amendment doctrine in light of contemporary needs.[31] With a few notable exceptions, the commentators also endorsed the desirability of formulating clear rules to guide the police.[32]

The process of formulating rules based on a balancing of interests has the appearance of judicial legislation. The Burger Court, however, crafted rules tending generally to give law enforcement an advantage. *Miranda* was a lightning-rod, but no more legislative in character than the Court's output in such decisions as *McLaughlin* or *Belton*. Off the bench, the

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out post-arrest judicial determination of probable cause); California v. Carney, 471 U.S. 386, 394 (1985) (holding that automobile exception to warrant requirement applies even when vehicle to be searched is proximate to court house where warrants can be sought); New York v. Belton, 453 U.S. 454, 460 (1981) (holding that police may search passenger compartment and any containers therein incident to arrest of motorist).

[30] For a sampling with titles that can do double-duty as parentheticals, see, for example, John M. Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151 (1979); Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 AM. CRIM. L. REV. 257 (1984); Steven Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889 (1987).

[31] I hasten to add that I agree with this basic project. For prominent examples in the legal literature, see 4 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 9.1(d), at 10-14 (3d ed. 1996) (arguing that the reasonableness clause authorizes some searches and seizures not supported by probable cause, but that application of the balancing test should proceed by formulating rules or standards to govern recurring categories of cases); Amsterdam, *supra* note 1, at 381-409 (arguing that Fourth Amendment requirements ought to vary from context to context in light of modern conditions, but also must be articulated as rules that the police can follow). Professor Amsterdam thought the best solution might be for courts to require the police to make regulations of their own, *see* Amsterdam, *supra* note 1, at 416-29, while Professor LaFave, who certainly favors police rule-making, thought the Supreme Court itself could do so. LAFAVE, *supra*, § 9.1(d), at 10-14.

[32] See DRIPPS, *supra* note 3, at 155-59, for a review of the academic bright-line rules debate.

Court's liberal critics accepted the form, but opposed the content, of the prevailing methodology. The Court's conservative critics accepted the content and went along with the form.

The tension between determinacy and legitimacy, however, did not go away. It only waited the proper Jeremiah to denounce it. Enter Justice Scalia, who began complaining about the subjectivity of Fourth Amendment jurisprudence and pointing to common-law practice as the appropriate reference point to resolve the indeterminacy challenge.[33]

Now each of the moves the Justices have made is a genuine response to a genuine challenge. The need for clarity is real; the authoritative legal materials (text and history) are unclear. In suggesting that none of the moves thus far attempted has succeeded in achieving determinacy and legitimacy together, I also readily acknowledge how difficult the task of constitutional adjudication can be.[34] Courts are multimember panels subject to the laws of collective decision theory.[35] They can decide only the cases that come before them, not hypothetical cases that might make better law than the actual cases. Still further, they are constrained by the arguments the parties choose to make or to omit.

One may, I believe, give full weight to these important caveats, and still suggest that courts can do better than they have in this area. Indeed, it is fair to say that much of what has gone wrong with Fourth Amendment jurisprudence reflects the procedural disadvantages of judge-made law. How to compensate for those disadvantages is a subject taken up in Part V. My basic thesis, however, has been described but not yet fully defended. To make my case that the Court's concern for clarity has undermined legitimacy, I focus on one important area of doctrine: the so-called warrant requirement, espe-

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[33] *See* Sklansky, *supra* note 9, at 1745-61.

[34] For a summary of the limitations on courts as policy-making bodies, see Amsterdam, *supra* note 1, at 350-52.

[35] *See, e.g.,* Frank H. Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802 (1982) (applying Arrow's Theorem to the Supreme Court). *See generally* Herbert Hovencamp, *Arrow's Theorem: Ordinalism and Republican Government*, 75 IOWA L. REV. 949 (1990), for an account of Arrow's Theorom.

cially as it pertains to stops, searches, and arrests of motorists.

II. Determinacy and Legitimacy in the Burger Court

By the time *Mapp* imposed the exclusionary rule on the states in 1961, the federal courts had developed what might be called a warrant-clause model of the Fourth Amendment. The model's underlying assumption held that the police may not do more without judicial authorization than they may do with it. From this premise followed the principle that a search was presumptively "unreasonable" unless authorized by a warrant that met the standards of the warrant clause—probable cause, particularity, and sworn support. Exceptions for searches-incident-to-arrest and automobile searches were characterized as illustrations of the general principle that genuine exigency could excuse the failure to obtain a warrant.

Some modern scholars have little empathy for the Court's focus on warrants.[36] Empirical evidence indicates that warrant applications are only rarely denied; their role as safeguards of individual rights lies in the costs they impose on the police by way of the application process.[37] The founders surely detested general warrants, but specific warrants are plainly approved of by the text of the warrant clause.[38]

However one resolves the historical debate about the founders' views, there is no question that the Court's long struggle with the warrant requirement reflects the shared belief of the Justices that a warrant or very good reasons why

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[36] *See, e.g.,* Telford Taylor, Two Studies in Constitutional Interpretation: Search, Seizure, and Surveillance and Fair Trial and Free Press 41 (1967) (arguing that the Framers viewed all warrants as "an enemy"); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 771-80 (1994) (same).

[37] *See* Donald Dripps, *Living with* Leon, 95 Yale L.J. 906, 922-30 (1986) (reviewing empirical research on the search warrant process).

[38] *See, e.g.,* Thomas Y. Davies, *Recovering the Original Fourth Amendment,* 98 Mich. L. Rev. 547, 583-90 (discussing framers' views of specific warrants); Amsterdam, *supra* note 1, at 411 ("The framers of the [F]ourth [A]mendment accepted specific warrants as reasonable: the second clause of the [A]mendment tells us so.").

one could not be had supplied the touchstone of Fourth Amendment legitimacy. From *Weeks*[39] through *Hicks*,[40] not a single Justice has questioned the proposition that the Fourth Amendment sometimes requires warrants. This was not simply the view of icons like Holmes and Brandeis, or of liberals like Murphy and Douglas, but also of Justices sensitive to both history and the needs of law enforcement. Justice Harlan, for example, found the warrant requirement implicit in the constitutional text; Justice White, who read the Fourth Amendment as requiring only reasonableness, also deemed warrants essential to reasonableness, albeit in fewer cases than did Justice Harlan. Ultimately, I argue, these same justices felt obliged by the need for clarity to abandon the warrant requirement they viewed as the touchstone of legitimacy.

Prior to *Mapp*, the federal courts accommodated the warrant requirement with law enforcement interests by taking a narrow, trespass-based view of the meaning of "searches,"[41] and generously interpreting the search-incident-to-arrest doctrine. Police having probable cause to arrest the suspect, but unable or unwilling to obtain a search warrant for his abode, could generally arrange a lawful arrest of the suspect at his residence. The Supreme Court's cases, although inconsistent, generally supported a broad search of the premises incident to the arrest.[42]

The Warren Court for a time tried to apply the warrant requirement embedded in the pre-*Mapp* federal cases without modification. *Aguilar*[43] reflects the rigors of the requirements

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[39] Weeks v. United States, 232 U.S. 383 (1914). *Weeks* is famous for the birth of the exclusionary rule, but the reason why the evidence was tainted was that the United States marshal had entered private premises without a warrant. *Weeks*, 232 U.S. at 386.

[40] Arizona v. Hicks, 480 U.S. 321, 326 (1987) (holding that after exigency justifying initial warrantless entry has ceased to exist, police must leave and obtain a warrant before any further searching absent some other "recognized exceptions to the warrant requirement").

[41] *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 466 (1928) (holding that wiretapping was not a search because suspect was not the victim of any trespass by government agents).

[42] For a broad discussion, see Chimel v. California, 395 U.S. 752 (1969).

[43] Aguilar v. Texas, 378 U.S. 108, 115 (1964) (holding that affidavit reciting

set out in the warrant clause, and *Hoffa*[44] reflects the narrow interpretation of "searches." State law-enforcement officers often could arrest on probable cause for vagrancy and like offenses, and then take advantage of the search-incident-to-arrest doctrine. This accommodation of the competing interests, however, was living on borrowed time.

The building inspection cases hold that searches not conforming to the warrant clause can be "reasonable,"[45] and *Terry*[46] extended this principle to police work. *Katz*[47] opened the door to classifying a wider variety of police methods as searches. The invalidation of broad vagrancy ordinances[48] greatly reduced the utility of search-incident to arrest to circumvent the warrant requirement.

The Court thus imposed an increasing price for judicial insistence on warrants supported by probable cause. As more police methods became subject to the Fourth Amendment, and the search-incident exception became less global, the warrant clause became an increasing obstacle to law enforcement. The need for clear guidance for police is especially urgent in the context of the warrant requirement. When police make an error about probable cause or reasonable suspicion, it is less than certain that they ever would have established probable cause or reasonable suspicion. Suppressing the fruits when it turns out that the police lacked adequate justifying suspicion therefore deprives the public of a case that could not have been made by law-abiding police. By contrast, when the police

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conclusory tip failed to establish probable cause).

[44] Hoffa v. United States, 385 U.S. 293, 303 (1966) (holding that government's forgiveness of suspect's old friends' crimes in exchange for friend's spying on suspect was not a search).

[45] *See, e.g.*, Camara v. Municipal Court, 387 U.S. 523, 538 (1967) (holding that governmental interest justifies search without a warrant if "reasonable legislative or administrative standards for conducting an area inspection" apply to dwellings).

[46] Terry v. Ohio, 392 U.S. 1, 30 (1968) (holding "stop-and-frisk" performed without a warrant was reasonable).

[47] Katz v. United States, 389 U.S. 347, 357 (1967) (holding all warrantless searches of the home as "per se unreasonable").

[48] *See, e.g.*, Papachristou v. Jacksonville, 405 U.S. 156, 162 (1972) (invalidating vagrancy ordinance as unconstitutionally vague).

have probable cause but fail to obtain a warrant, suppressing the fruits costs the public a case which could have made by law-abiding police.

For a decade after Warren Burger took his seat, the Court was closely and inconsistently divided between the warrant-based approach, championed by Justices Harlan and Stewart, and an *ad hoc* approach focused on reasonableness championed by Justice White. Eventually the Court came down decisively in favor of a reasonableness model expressed in the form of bright-line rules, the very model now under attack by common-law historical methodology.

Early in 1969, while Warren was still Chief Justice, Harlan wrote the Court's opinion in *Spinelli v. United States*.[49] *Spinelli* formalized the *Aguilar* Court's approach to search warrants based on an informant's tip into a "two-pronged test".[50] The affidavits supporting the warrant application must aver both that the informant is reliable, and disclose the informant's basis for believing that the search would secure evidence of crime.[51]

Later that term, the Court clarified, and probably narrowed, the scope of the search-incident-to-arrest doctrine. Search-incident is the most commonly-invoked exception to the warrant requirement. The prevailing rule permitted the police to search the immediate area of a person lawfully arrested without a warrant, although applications of this rule varied widely. In *Chimel v. California* the Court, per Justice Stewart, based the exception on the risk that the suspect might destroy incriminating evidence or forcibly resist. Thus, any search that went beyond areas into which the suspect might reach, absent a warrant, was unreasonable.[52]

The warrant approach and the reasonableness approach were both in evidence early in 1970. In one case, *Vale v. Loui-*

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[49] 393 U.S. 410 (1969).
[50] *Spinelli*, 393 U.S. at 413.
[51] *Id.*
[52] Chimel v. California, 395 U.S. 752, 763 (1969).

siana,[53] the Court followed the warrant approach. Vale was a suspected narcotics dealer for whose arrest the police had warrants.[54] They had information that he could be found at his mother's house, which they placed under surveillance.[55] A known narcotics user drove up to the house; the driver honked, and Vale left the house, looked carefully up and down the street, and had a brief conversation with the driver.[56] The police arrested both men, then searched the house.[57] Evidence was found in a bedroom.[58]

The Supreme Court suppressed the evidence because the police had no search warrant.[59] The search was not incident to the arrest, because Vale was arrested outside and obviously could not, under the *Chimel* test, "grab" anything out of the bedroom.[60] Vale had given no consent to the search.[61] There was no emergency that might justify dispensing with a warrant, because the police had established that no one else was in the house well before they searched the bedroom for drugs.[62] Indeed, the majority indicated that the police, without a warrant, could not so much as enter the house to make sure that a confederate of Vale's was not within, poised to destroy the evidence.[63]

In *Chambers v. Maroney*,[64] decided the same day as *Vale*, the Court upheld the warrantless search of an automobile that had been impounded by the police.[65] The long-recognized automobile exception was predicated on the mobility of cars and the inconvenience attending forcing motorists to wait while a

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[53] 399 U.S. 30 (1970).
[54] *Vale*, 399 U.S. at 36.
[55] *Id.* at 36.
[56] *Id.* at 37.
[57] *Id.*
[58] *Id.* at 33.
[59] *Id.*
[60] *Id.* at 33-34.
[61] *Id.* at 35.
[62] *Id.* at 34.
[63] *Id.*
[64] 399 U.S. 42 (1970).
[66] *Chambers*, 399 U.S. at 48.

warrant is sought. But these considerations were absent in *Chambers*.[66]

Justice White reasoned that so long as the police had probable cause for the search, "there is little to choose in terms of practical consequences between an immediate search without a warrant and the car's immobilization until a warrant is obtained."[67] This is true, so far as it goes; but it neglects the possibility that probable cause might be debatable. In such a case, having a judge make the call rather than the police is precisely what the warrant requirement is all about. Put another way, if probable cause is simply assumed, there is equally "little to choose" between searching a *house* without a warrant now, and searching it with a warrant later.

Justice Harlan, the lone dissenter, clung to the warrant-clause model. Fidelity to the warrant requirement meant that "where exceptions are made to accommodate the exigencies of particular situations, those exceptions be no broader than necessitated by the circumstances presented."[68] That *Vale* and *Chambers* could issue from the same Court on the same day demonstrates the depth of the Justices' ambivalence about the warrant clause.

The approach taken in *Chambers* would eventually prevail. Nonetheless, the warrant-centered approach was a long time dying. In *Coolidge v. New Hampshire*,[69] Justices Douglas, Brennan and Marshall joined Justice Stewart in reversing a murder conviction because the state courts had admitted evidence obtained by forensic tests performed on the defendant's automobile.[70] Police, following the arrest of the defendant, had seized the car pursuant to a search warrant; and the majority did not hold that the supporting affidavits failed to establish probable cause.[71]

Rather, the Court threw out the warrant because it had

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[66] *Id.* at 42.
[67] *Id.* at 52 (footnote omitted).
[68] *Id.* at 61 (Harlan, J., dissenting).
[69] 403 U.S. 443 (1971).
[70] *Coolidge*, 403 U.S. at 449.
[71] *Id.* at 450.

been issued by the State Attorney General, sitting as a justice of the peace, while he was directing the investigation into the crime.[72] "Since he was not the neutral and detached magistrate required by the Constitution, the search stands on no firmer ground than if there had been no warrant at all."[73]

Justice Stewart then methodically disposed of the state's contention that the search fell into at least one of three distinct exceptions to the warrant requirement.[74] The search was not incident to the arrest, because once an "accused is under arrest and in custody, then a search [of his car] made at another place, without a warrant, is simply not incident to the arrest."[75] Nor was the evidence in plain view, for its discovery was the fruit of the warrantless seizure of the automobile.[76]

> [N]o amount of probable cause can justify a warrantless search or seizure absent "exigent circumstances." Incontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure.[77]

From the perspective of the warrant clause, it was quite straightforward.

As for the automobile exception:

> The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears . . . . In short, by no possible stretch of the legal imagination can this be made into a case in where "it is not practicable to secure a warrant," and the "automobile exception," despite its label, is

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[72] *Id.* at 453.

[73] *Id.*

[74] *Id.*

[75] *Id.* at 457 (quoting Preston v. United States, 376 U.S. 364, 367 (1964)) (bracketed material supplied by the *Coolidge* Court).

[76] *Id.* at 464-73.

[77] *Id.* at 468 (citations omitted).

simply irrelevant.[78]

The defendant was under arrest and the vehicle was being watched by officers, there was no excuse for the failure of the police to obtain a genuine judicial warrant.[79] Justice Stewart acknowledged *Chambers*,[80] but gave no hint of how that case could be distinguished.[81]

In truth, *Chambers* had disregarded the pre-*Mapp* cases' focus on the warrant clause, so that Justice Stewart had a preponderance of precedent on his side. Nonetheless, the holding was supported, against the vigorous and even bitter dissents of four Justices, only by the ambivalent concurrence of Justice Harlan.[82] In Harlan's view, though not without some reservation, Stewart had correctly insisted on the primacy of the warrant clause in construing the Fourth Amendment, and the illegality of the search that followed.[83] But Harlan did not believe that "anything the State did in this case could be said to offend those values which are 'at the core of the Fourth Amendment.'"[84]

Mapp and *Ker v. California*,[85] which had applied the existing federal law of search and seizure to the states without modification or exception, laid at the basis of Harlan's disquiet with the result in *Coolidge*.[86] The Fourth Amendment itself imposed standards so high that the states should not be bound

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[78] *Id.* at 461-62 (citations omitted).

[79] *Id.* at 447.

[80] *Id.* at 458.

[81] Justice White, dissenting, agreed the *Chambers* did not control, but only because the car was searched after having been impounded indefinitely. *See id.* at 523 (White, J., dissenting). Justice Stewart did not take this line, prompting White to record that "I disagree strongly with the majority's reasoning for refusing to apply" *Chambers*. *Id.*

[82] *Id.* at 490-91 (Harlan, J., concurring).

[83] *Id.* at 491. Harlan might not have agreed with Stewart's treatment of the search-incident theory under pre-*Chimel* cases, which the plurality thought to govern Coolidge's case. In his view, however, *Chimel* applied retroactively. *See id.* at 491 n.*.

[84] *Id.* at 491 (quoting Wolf v. Colorado, 338 U.S. 25, 25 (1949), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961)).

[85] 374 U.S. 23 (1963).

[86] *Coolidge*, 403 U.S. at 491.

by them, especially when exclusion of evidence was the price of error. So long as the law required state police to comply with the federal standard, however, Harlan was "unwilling to lend [his] support to setting back the trend of [the Court's] recent decisions", principally *Chimel*.[87] To do so would "go far toward relegating the warrant requirement of the Fourth Amendment to a position of little consequence in federal search and seizure law . . . ."[88]

The trend Harlan wrote of was about to be checked. Dissenting in *Coolidge*, Chief Justice Burger decried "the monstrous price we pay for the exclusionary rule in which we seem to have imprisoned ourselves."[89] Justice Black dissented, both on the ground that the evidence, if illegally seized, should have been admitted anyway; and on the ground that the search matched all three of the exceptions rejected by Stewart.[90] In his view, predictably, the root of the problem was not incorporation, but the willingness of his colleagues to decree unsavory results not intended by the framers.[91] Justice White dissented on plain-view grounds, and Justice Blackmun joined the exclusionary rule portion of Black's opinion.[92]

After *Coolidge*, the momentum shifted, albeit gradually and erratically, away from a warrant-clause model and toward a model based on unconstrained notions of reasonableness. The watershed decision was *United States v. Robinson*.[93] A District of Columbia police officer named Jenks arrested Robinson for driving without a license.[94] Department policy called for searching the person of any person arrested, and Jenks followed the policy.[95] In the course of the search, he felt a crumpled cigarette pack in the suspect's coat pocket.[96] In the pack

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[87] *Id.* at 492.
[88] *Id.*
[89] *Id.* at 493 (Burger, C.J., dissenting).
[90] *Id.* at 493 (Black, J., dissenting).
[91] *Id.* at 496.
[92] *Id.* at 510.
[93] 414 U.S. 218 (1973).
[94] *Robinson*, 414 U.S. at 219.
[95] *Id.* at 221-22.
[96] *Id.* at 223.

were objects that were not cigarettes.[97] Pulling the pack from Robinson's pocket, the officer opened the pack, revealing fourteen gelatine capsules of heroin.[98]

Robinson sought to suppress the heroin as the fruit of an illegal search.[99] The long-recognized authority to search an arrested person without a warrant, he argued, was cabined by exigency.[100] *Chimel* had limited the area that might be searched incident to an arrest to those areas from which the suspect might snatch either evidence or a weapon.[101] If Jenks had no reason to believe that weapons or evidence might be on Robinson's person, then the reasoning of *Chimel* required holding the search unreasonable for want of both probable cause and a warrant.[102]

The majority rejected Robinson's claim, and the warrant-clause model along with it. Justices Rehnquist and Powell had replaced Justices Black and Harlan; and Justice Rehnquist wrote for the majority. The authority to search incident to arrest did not, the majority wrote, derive from exigency in particular cases.[103] Rather, the need for immediate search in even a few cases justified the authority to search in every case.[104]

The Court registered its "fundamental disagreement" with the suggestion that,

> there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest. . . . A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful

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[97] *Id.*
[98] *Id.*
[99] *Id.* at 220.
[100] *Id.*
[101] *Id.*
[102] *Id.* at 227.
[103] *Id.* at 236.
[104] *Id.* at 235.

> arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.[105]

Thus, the need for bright-line rules was married to the reasonableness model of the Fourth Amendment, and the Burger Court had found its paradigm for searches and seizures.

What went undecided in *Robinson* was the question of whether the police could make full-blown arrests whenever the police had probable cause to believe that the suspect has committed even a trivial criminal offense. In *Robinson*, police regulations apparently required police to arrest, rather than simply cite, those stopped for driving without a license,[106] and the court of appeals had concluded that the arrest had not been made for the ulterior purpose of searching for narcotics.[107] In the companion case of *Gustafson v. Florida*, however, "the officer . . . was not required to take the petitioner into custody by police regulations as was in *Robinson* . . . ."[108] Justice Powell and Justice Stewart each wrote separately to express the view that Gustafson had not challenged the validity of the underlying arrest, leaving open the question—later resolved so unhappily in *Atwater*—of whether the Fourth Amendment permits custodial arrests for all offenses however trivial.[109]

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[105] *Id.* at 235. In a companion case, Gustafson v. Florida, 414 U.S. 260 (1973), the Court held that this passage means what it says. Florida conceded that Gustafson was not searched pursuant to a general police policy, that he was not dangerous, and that the crime for which he was arrested (driving without a license) was neither violent nor susceptible to proof by evidence that might be discovered during a pat-down search. *Gustafson*, 414 U.S. at 265. None of that mattered; given that Gustafson was lawfully arrested, his person could lawfully be searched. *Id.* at 266.

[106] *See Robinson*, 414 U.S. 222 n.2.

[107] *See id.* at 222 n.1.

[108] *Gustafson*, 414 U.S. at 265.

[109] Justice Stewart stated:

> It seems to me that a persuasive claim might have been made in this case that the custodial arrest of the petitioner for a minor traffic offense violated his rights under the Fourth and Fourteenth Amendments. But

The search-incident exception would not matter so much if the Fourth Amendment required *arrest* warrants whenever the police "seize" the suspect's "person". If, on the other hand, the Fourth Amendment permitted the police to force entry into a suspect's residence without either a search warrant for the premises or an arrest warrant for the person, the warrant requirement would be a virtual dead letter. Probable cause to search and probable cause to arrest are distinct, but the two species of probable cause frequently coincide, especially in cases involving possession of contraband.

The solution to the problem of warrantless arrests mirrored the solution that would more slowly emerge for warrantless searches. In February of 1975, the Court dealt with a challenge to pretrial confinement of Florida suspects who had been arrested absent warrants (at least so far as the record showed) and then charged by information.[110] Thus, the only officials who had passed on the question of probable cause to hold them for trial were the police and the prosecutor. Some of the detainees filed a class action civil rights suit in federal court, seeking an order compelling the state to test the probable cause issue at a judicial hearing.[111] The lower federal courts held that the state must test probable cause at an adversary judicial hearing at which the suspect is represented by counsel.[112]

If the Supreme Court had agreed with this holding, the

> no such claim has been made. Instead, the petitioner has fully conceded the constitutional validity of his custodial arrest.

Id. at 266-67 (Stewart, J., concurring). Justice Powell agreed Gustafson might have been able to challenge the validity of his arrest:

> In *Gustafson* . . . the petitioner conceded the validity of the custodial arrest, although that conclusion was not as self-evident as in *Robinson*. *Gustafson* would have presented a different question if the petitioner could have proved that he was taken into custody only to afford a pretext for a search actually undertaken for collateral objectives. But no such question is before us.

Id. at 238 n.2 (citations omitted).

[110] Gerstein v. Pugh, 420 U.S. 103, 105 (1974).

[111] *Gerstein*, 420 U.S. at 106-07.

[112] *Id.* at 107.

warrant requirement might have faded into irrelevance in the arrest context. Why trouble with an *ex parte*, high-volume procedure to obtain an arrest warrant, when an arrested person would soon enough be able to test probable cause at a full-blown adversary hearing? And if a judge has issued a warrant before arrest, why revisit the probable cause issue once again? If, on the other hand, the Supreme Court had agreed with the state's position that a judicial determination of probable cause to hold for trial is unnecessary, why should any officer ever have to obtain an arrest warrant?

In *Gerstein*, the Court split the difference by holding that an individual arrested without a warrant has a Fourth Amendment right to a prompt judicial determination of probable cause, but not at an adversary hearing.[113] All that was required after arrest was an appearance before a neutral and detached magistrate.[114] The first appearance was not a "critical stage" of the proceedings at which the right to counsel applied.[115]

In effect, the only difference between the constitutionally-required first appearance and an application for an arrest warrant is the presence of the suspect at the former. Indeed, suspects arrested on warrants have no right to another judicial determination of probable cause. The Court required only that the state "provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest."[116]

Gerstein prepared the way for the decision, in the following year, of *United States v. Watson*.[117] *Watson* held that the Fourth Amendment's warrant requirement does not apply to arrests effected in a public place when the crime for which the arrest is made is a felony, or is a misdemeanor committed in

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[113] *Id.* at 125-26.
[114] *Id.* at 114.
[115] *Id.* at 122.
[116] *Id.* at 125.
[117] 423 U.S. 411 (1976).

the officer's presence.[118] Justice White wrote the Court's opinion, and relied heavily on the historical practice, reflected in both state and federal statutes, permitting warrantless arrests.[119] Justice Powell, concurring, succinctly captured the difficulty: "Since the Fourth Amendment speaks equally to both searches and seizures, and since an arrest, the taking hold of one's person, is quintessentially a seizure, it would seem that the constitutional provision should impose the same limitations upon arrests that it does upon searches."[120]

If that were so, then arrest warrants, like search warrants, would be required except in narrowly-defined categories predicated on exigency. Justice Powell himself, however, acknowledged that "historical and policy reasons . . . justify the Court's sustaining of a warrantless arrest upon probable cause, despite the resulting divergence between the constitutional rule governing searches and that now held applicable to seizures of the person."[121] Even Justice Stewart, the strongest supporter of search warrants, concurred in *Watson*.[122] He wrote separately solely to reserve the question of whether an officer might need a warrant to enter private premises to effect an arrest.[123] Only Brennan and Marshall dissented.[124]

Robinson and *Watson* emboldened the Ford Administration's Solicitor General's Office to attack the warrant requirement for searches. A perfect case was at hand: *United States v. Chadwick*.[125] Amtrak workers in San Diego became suspicious of two Boston-bound passengers, Machado and Leary, who had loaded a heavy footlocker, leaking talcum powder, onto a train.[126] The pair behaved suspiciously, the trunk was unusually heavy, and the railroad workers knew

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[118] *Watson*, 423 U.S. at 418.
[119] *Id.*
[120] *Id.* at 428.
[121] *Id.* at 432.
[122] *Id.* at 433 (Stewart, J., concurring).
[123] *Id.* at 433 (Stewart, J., dissenting).
[124] *Id.* at 433 (Marshall, J., dissenting).
[125] 433 U.S. 1 (1977).
[126] *Chadwick*, 433 U.S. at 3.

that talcum was used to mask the scent of marijuana and hashish.[127] They notified authorities, and federal narcotics agents, accompanied by a drug-sniffing dog, met the train in Boston.[128]

Machado and Leary moved the footlocker by baggage cart into the departure area.[129] The dog conveyed to the agents the presence of illegal drugs within; but Machado and Leary were not put wise.[130] Instead, Chadwick met the two smugglers and helped them load the footlocker into the trunk of Chadwick's car.[131] The agents placed the three men under arrest while the automobile trunk was still open.[132] The two-hundred pound footlocker was removed to the federal building, where agents either opened or broke the lock and discovered marijuana.[133] They had not bothered to obtain a warrant.[134]

The district court and the First Circuit rejected the government's invocation of the search-incident-to-arrest and automobile exceptions to the warrant requirement. The government then petitioned the First Circuit for a rehearing, raising the argument that would take the case to the Supreme Court: that the Fourth Amendment was about reasonableness, not about warrants. The cases in which reasonableness depended on a warrant, the government argued, were the exceptions rather than the rule.

The First Circuit rejected this submission, and the case came to the Supreme Court on the government's petition for certiorari. In a brief prepared by, among others, Robert Bork and Frank Easterbrook, the government asked the Court to apply the reasoning of *Robinson* and *Watson* to the search of personal effects seized from a person on the street or from a vehicle. The government's theoretical premise was "that the

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[127] *Id.*
[128] *Id.*
[129] *Id.* at 4.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.*
[134] *Id.*

guiding standard of the Fourth Amendment is reasonableness . . . and that not all interferences with a person's liberty or privacy are of equal magnitude or demand equal protection."[135] The operational implication was that warrants are required only when searches invade "core privacy interests" such as "homes, offices, or private communications."[136] Only then are "the particular privacy interest[s] at stake . . . sufficiently important that any intrusion must be justified not only by probable cause but also by a determination of probable cause by a neutral and detached magistrate in advance of the search."[137]

The government invoked history, policy and precedent in support of its theory. Historically, there was no evidence indicating that at the time of Fourth Amendment's adoption warrants were required to search personal effects. History was in any event quite clear that the founders saw warrants themselves as instruments of oppression. From the policy standpoint, warrants cost time and trouble to obtain, and enforcing the warrant requirement implies losing convictions because of inevitable police errors about when a warrant is required and when the search-incident or automobile exceptions apply. Precedent approved warrantless automobile searches and warrantless arrests, even absent exigent circumstances. Were not effects just as mobile as people and vehicles? Was there not a diminished expectation of privacy in containers carried about on the street, as opposed to the contents of the home?

As often happens when the batter swings for the fences, the government struck out. The Court unanimously rejected the government's theory. Chief Justice Burger, who had decried the "monstrous price" of the exclusionary rule in *Coolidge*, wrote a majority opinion stoutly asserting that "the protections a judicial warrant offers against erroneous governmental intru-

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[135] Brief for Petitioner, at *9, United States v. Chadwick, 433 U.S. 1 (1977) (No. 75-1721), *available at* 1977 WL 189820.

[136] *Id.* at *12.

[137] *Id.* at *10.

sions are effective whether applied in or out of the home."[138] The Fourth Amendment in terms protects "persons, houses, papers, and effects"; the "absence of a contemporary outcry against warrantless searches in public places was because, aside from searches incident to arrest, such warrantless searches were not a large issue in colonial America";[139] and in any event the Framers "intended the Fourth Amendment to safeguard fundamental values which would far outlast the specific abuses which gave it birth."[140]

With respect to the instant case, people put locks on their luggage precisely to safeguard its privacy. The automobile exception did not extend to locked containers inside vehicles, because "a person's expectations of privacy in personal luggage are substantially greater than in an automobile."[141] The search-incident claim was foreclosed by *Chimel*. There being no exigency, such as might have existed if the police suspected explosives, rather than cannabis, in the footlocker, the warrantless search was illegal even though supported by probable cause.

Justice Blackmun and Justice Brennan wrote separately to castigate the Solicitor General's office for advancing its novel theory. Blackmun, dissenting, found it "unfortunate that the Government sought a reversal in this case primarily to vindicate an extreme view of the Fourth Amendment that would restrict the protection of the Warrant Clause to private dwellings and a few other 'high privacy' areas."[142] Blackmun, who was joined by Rehnquist, quite agreed with the Court about the government's theory; but in his view the government's submission distracted attention from the applicability of the search-incident exception, which the Justice thought justified a warrantless search.[143]

Brennan, concurring, found it "deeply distressing that the

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[138] *Chadwick*, 433 U.S. at 9-10.
[139] *Id.* at 8.
[140] *Id.* at 9.
[141] *Id.* at 13.
[142] *Id.* at 17 (Blackmun, J., dissenting).
[143] *Id.* at 19 (Blackmun, J., dissenting).

Department of Justice, whose mission is to protect the constitutional liberties of the people of the United States, should even appear to be seeking to subvert them by extreme and dubious legal arguments."[144] He found it "gratifying that the Court today unanimously rejects the government's position."[145]

Two years later, in *Arkansas v. Sanders*,[146] the Court reaffirmed the *Chadwick* holding. A reliable informant told Little Rock police that a man named Sanders would arrive on an American Airlines flight at 4:35 that afternoon, carrying a green suitcase containing marijuana.[147] Sanders arrived as predicted, met another man, and the pair took a cab from the airport after placing the suitcase in the trunk of the taxi.[148] The police pulled the taxi over and searched the suitcase, discovering marijuana.[149] Following *Chadwick*, the Supreme Court of Arkansas suppressed the evidence, and the Supreme Court affirmed.[150]

Justice Powell's majority opinion admitted that the Little Rock "police acted properly—indeed commendably—in apprehending respondent and his luggage."[151] They did not, however, act *reasonably* when the searched the suitcase without a warrant. The state "failed to carry its burden of demonstrating the need for warrantless searches of luggage properly taken from automobiles."[152]

Justice Blackmun dissented, joined only by Rehnquist.[153] Blackmun doubted the value of the warrant requirement: "Since the police, by hypothesis, have probable cause to seize the property, we can assume that a warrant will be routinely

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[144] *Id.* at 16 (Brennan, J., concurring).
[145] *Id.* (Brennan, J., concurring).
[146] 442 U.S. 753 (1979).
[147] *Sanders*, 442 U.S. at 755.
[148] *Id.*
[149] *Id.*
[150] *Id.* at 756.
[151] *Id.* at 761.
[152] *Id.* at 763. The state failed despite the efforts of its then-former Attorney General, Bill Clinton, who worked on the brief for Arkansas. *Id.*
[153] *Id.* at 768 (Blackmun, J., dissenting).

forthcoming in the overwhelming majority of cases."[154] On the other side of the scales, the indeterminacy of the distinction between the automobile (which could be searched without a warrant, given probable cause) and objects within it (at least some of which could not be searched without a warrant) would baffle the police.[155]

The Chief Justice concurred, and replied to Blackmun's argument.[156] The Court's failure to adopt "a 'clear' rule [was] not cause for lament, however desirable it might be to fashion a universal prescription governing the myriad Fourth Amendment cases that might arise. The Court is construing the Constitution, not writing a statute or a manual for law enforcement officers."[157]

The enthusiasm for warrants was not limited to searches, but included arrests as well. In *Payton v. New York*[158] the Justices resolved the issue left open in *Watson*: whether police, having probable cause but no warrant to arrest the suspect for a felony, may force entry to private premises to effect the arrest. Payton was convicted of murder; some of the evidence against him was seized in plain view by officers who had arrested him inside his house after forcing the door with prybars.[159] The police had no warrant, but a state statute autho-

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[154] *Id.* at 770 (Blackmun, J., dissenting).

[155] *Id.* at 772 (Blackmun, J., dissenting).

> Or suppose the arresting officer opens the car's trunk and finds that it contains an array of containers—an orange crate, a lunch bucket, an attaché case, a duffelbag, a cardboard box, a backpack, a totebag, and a paper bag. Which of these may be searched immediately, and which are so "personal" that they must be impounded for future search only pursuant to a warrant? . . . The lines that will be drawn will not make much sense in terms of the policies of the Fourth and Fourteenth Amendments. And the heightened possibilities for error will mean that many convictions will be overturned, highly relevant evidence again will be excluded, and guilty persons will be set free in return for little apparent gain in precise and clearly understood constitutional analysis.

Id. at 772. (Blackmun, J., dissenting).

[156] *Id.* at 766 (Burger, C.J., concurring).

[157] *Id.* at 768 (Burger, C.J., concurring).

[158] 445 U.S. 573 (1980).

[159] *Payton*, 445 U.S. at 566-67.

rized warrantless entries of the suspect's home, and the New York Court of Appeals upheld the constitutionality of the statute.[160] The Supreme Court reversed.[161]

Justice Stevens wrote for a six-justice majority. The majority reasoned that if a warrant is required to search a house for evidence, a warrant logically must also be obtained to enter the house to arrest.[162] The trouble with this syllogism was history: warrantless entries to arrest had been approved by American courts for hundreds of years. Justice Stevens made a valiant effort to characterize the common-law rule at the time of the Fourth Amendment's adoption as uncertain; but there was nothing uncertain about American practice in the two hundred years since.[163] Forced to choose between logic and history, the majority chose logic.

The choice reflects the odd historical position of the warrant requirement. The framers saw warrants as immunizing officers against actions for false arrest or trespass. The common-law supplied the citizen's protection against government agents, and warrants took that protection away. Indeed, as Justice White pointed out in his *Payton* dissent, the original version of the Fourth Amendment did not contain the clause forbidding unreasonable searches, but simply forbade warrants that were general, lacked probable cause, or were unsupported by oath.[164] The founders, in other words, thought that the common-law tort remedy would ensure the reasonableness of warrantless searches (they certainly had no preference for general warrantless searches over general warrants; the vice of the latter was that they abrogated the serious penalties applicable to the former).[165] Thus the constitutional provision need

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[160] *Id.* at 577.

[161] *Id.* at 576.

[162] *Id.* at 589.

[163] *Id.* at 598.

[164] *Id.* at 610 (White, J., dissenting).

[165] *See* Davies, *supra* note 38. Professor Davies makes the point that some founding-era authorities held that trespass liability might still attach to the witnesses who supported the warrant application (which in some cases would include the executing officers themselves) when a search under warrant failed to find the suspected items. *Id.* at 589. Thus it is not quite right to say that warrants elimi-

only restrain the government's resort to warrants.

Only with the recognition, in the twentieth century, that the tort remedy had become ineffectual, did a warrant requirement begin to make sense. If the common law had lost its teeth, the exclusionary rule offered constitutional fangs to replace them. Until the 1984 decision in *United States v. Leon*,[166] however, warrants were not thought to immunize searches or arrests against motions to suppress. The rise of the warrant requirement during Prohibition and then under Justice Jackson's post-Nuremberg influence reflects a judicial admission that the exclusionary rule had replaced common-law tort actions as the primary remedy for illegal searches and seizures.

If history is set aside, the majority's position seems very strong. If the police needed a warrant to break into Chadwick's footlocker, how could they break into Payton's house without one? Strictly speaking, police entering the suspect's home to arrest him engage in two, rather than one, Fourth Amendment events. They are searching the house for the suspect, whom they hope to seize. But, the *Payton* Court concluded that "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within."[167] *Chimel* would govern the scope of any warrantless search that took place incident to the arrest.

Does an arrest warrant "implicitly" carry any further power to search? A year after *Payton*, in *Steagald v. United States*,[168] the Court answered this question in the negative. Police with a warrant to arrest Lyons had probable cause to believe that Lyons was in the abode of Steagald.[169] Lyons was not, but drugs in plain view were.[170] The Court held that the arrest warrant did not authorize entry of a third-party's resi-

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nated liability for trespass; but they did sharply limit it. *See id.*

[166] 468 U.S. 897 (1984).

[167] *Peyton*, 445 U.S. at 603.

[168] 451 U.S. 204 (1981).

[169] *Steagald*, 451 U.S. at 206.

[170] *Id.* at 206-07.

dence.[171] Police in such a situation must obtain a search warrant supported by a probable cause to believe that the suspect is to be found in the third party's house. Justice Marshall, for the majority, pointed out that an arrest warrant could otherwise operate as a general search warrant, citing a case in which police were finally enjoined from continuing a search for two fugitives that had invaded three hundred houses.[172] Only Justices Rehnquist and White dissented.[173]

The warrant-clause model never seemed more robust. Justice White, the chief proponent of a reasonableness model, had joined the majority in *Chadwick* and *Sanders*. The Chief Justice, a bitter critic of the exclusionary rule, had written *Chadwick* himself, and indicated in *Sanders* that the police would either have to guess about the limits on their authority or take the time and trouble of getting a warrant. The tide, however, was about to turn again, this time to run out.

The harbinger of the sea-change was *New York v. Belton*.[174] A New York state trooper stopped a car for speeding.[175] Belton was one of four men in the car.[176] The trooper determined that none of the people in the car either owned it or were related to the owner.[177] He also smelled marijuana, and saw an envelope on the floor of the car marked "Supergold."[178] He ordered the men out of the car, informed them that they were under arrest for possessing marijuana and then searched each of them.[179] He also searched the passenger compartment of the car, the glove compartment, and a black leather jacket lying in the back seat.[180]

The jacket had a zippered pocket.[181] The trooper opened

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[171] *Id.* at 222.
[172] *Id.* at 215 (citing Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966)).
[173] *Id.* at 223 (Rehnquist, J., dissenting).
[174] New York v. Belton, 453 U.S. 454 (1981).
[175] *Belton*, 453 U.S. at 455.
[176] *Id.*
[177] *Id.*
[178] *Id.* at 455-56.
[179] *Id.* at 456.
[180] *Id.*
[181] *Id.*

it, and discovered cocaine.[182] The jacket was Belton's, and he later moved to suppress the cocaine.[183] The New York Court of Appeals ruled that the cocaine was illegally seized, because, under *Chimel*, none of the suspects had access to the jacket at the time of the search.[184]

The Supreme Court reversed, holding that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[185] And it "follows from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach."[186]

This rule applies whether or not the police have any reason to suppose that a weapon might be hidden in the vehicle or in a container, and whether or not the container is open, closed, or even locked.[187] Just as in *Robinson,* "the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have."[188]

The explanation for the turnaround does not lie with any change in judicial personnel. Quite to the contrary, Justice Stewart, long a staunch defender of the warrant requirement, not only joined the majority but actually wrote the opinion. Justice White, the chief promoter of a reasonableness model, dissented, pointing out that the Court's new rule permits searches of private containers not only without a warrant, but also without probable cause.[189]

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[182] *Id.*

[183] *Id.*

[184] *Id.*

[185] *Id.* at 460 (footnote omitted).

[186] *Id.*

[187] *Id.* at 461.

[188] *Id.*

[189] *Id.* at 472 (White, J., dissenting) ("Here, searches of luggage, briefcases, and other containers in the interior of an auto are authorized in the absence of any suspicion whatsoever that they contain anything in which the police have a legiti-

The proposition that a search incident to arrest might be "reasonable" without either probable cause or a warrant was a Rubicon the Court had crossed in *Robinson*. Just as in *Robinson*, the justification for the new approach lay in the need for clarity. The Court embraced Professor LaFave's plea for bright-line rules,[190] reasoning that the police cannot comply with a constitutional standard without knowing what it requires.

But the fact that a line must be drawn somewhere does not justify drawing it anywhere. Professor LaFave, for one, endorsed the claim of Justice Brennan that *Chimel* "is not nearly as difficult to apply as the Court suggests" and in fact provided "a sound, workable rule for determining the constitutionality of a warrantless search incident to arrest."[191] In LaFave's view, there was nothing unclear about *Chimel* in the context of searching motorists incident to arrest: Once the suspect is out of the vehicle, *Chimel* and *Robinson* authorize a search of the person, but not of the car.[192] Any search of the car could take

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mate interest.").

[190] *Id.* at 458.

> Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

LaFave, *supra* note 3, at 142.

[191] New York v. Belton, 453 U.S. 454, 471 (1981) (Brennan, J., dissenting).

[192] Wayne LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. PITT. L. REV. 307, 330 (1982):

> Indeed, it is fair to say that applying the traditional search-incident-to-arrest rule . . . is *easier* in automobile cases than in most other circumstances because the police can, and typically do, immediately remove the arrestee from the vehicle. Once that has been done, it is not difficult to take another step, such as moving him farther from the car, handcuffing him, of closing the car door, thus ensuring the nonexistence of circumstances in which the arrestee's "control" of the car is in doubt. In other words, the "difficulty" and "disarray" the *Belton* majority alluded to has been more a product of the police seeing how much they could get away

place without a warrant, because of the automobile exception, but must be supported by probable cause. Under *Chadwick* and *Sanders,* any private container in the car could be searched only after police obtain a warrant.

As LaFave admitted, there *was* considerable confusion over when effects found within vehicles were governed by *Chadwick* and *Sanders* and when they were governed by *Chambers*. The "problems the Court responded to in *Belton*, by revamping the search-incident-arrest rule are actually attributable to the tension between some of the Court's recent cases on the dimensions of the search warrant requirement as to vehicles and their contents."[193] Unfortunately, in a companion case to *Belton*, the Justices further confused the law governing the automobile exception to the warrant requirement.

In *Robbins v. California*,[194] police stopped Robbins's car after observing him driving erratically.[195] Robbins got out of his station wagon and walked toward the police.[196] When asked for identification, Robbins fumbled with his wallet.[197] The police smelled marijuana smoke when Robbins opened the car to retrieve the vehicle registration certificate.[198] Robbins was placed under arrest, and the police then searched the car.[199] Inside a recessed luggage well in the rear of the station wagon, accessible only by turning a handle, they discovered a tote bag and two cigar-box sized parcels, wrapped in opaque plastic.[200] When the police opened the packages, they discovered that each contained fifteen pounds of marijuana.[201]

The Court held that the police could not open the packages

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with (by not following the just-mentioned procedures) than of their being confronted with inherently ambiguous situations.

Id. (footnote omitted) (emphasis in original).

[193] *Id.* at 330-31 (footnote omitted).

[194] 453 U.S. 420 (1981) (plurality opinion).

[195] *Robbins*, 453 U.S. at 422.

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.*

[200] *Id.*

[201] *Id.*

without a warrant.[202] According to a plurality of four, who joined an opinion by Justice Stewart, the key fact was that the packages were wrapped so as to occlude their contents.[203] Chadwick's footlocker and Sanders' suitcase "were immune from a warrantless search because they had been placed within a closed, opaque container and because Chadwick and Sanders had thereby reasonably 'manifested an expectation that the contents would remain free from public examination.'"[204] From this perspective, no distinction could be drawn between locked luggage and paper bags, or even loose wrapping in newspaper.

Justice Powell concurred, but wrote separately to express the view that,

> *Chadwick* and *Sanders* require police to obtain a warrant to search the contents of a container only when the container is one that generally serves as a repository for personal effects or that has been sealed in a manner manifesting a reasonable expectation that the contents will not be open to public scrutiny.[205]

Chief Justice Burger concurred, without joining either the opinion of either Powell or the plurality.[206]

As the plurality put it, the Court granted certiorari in *Robbins* "[b]ecause of continuing uncertainty as to whether closed containers found during a lawful warrantless search of an automobile may themselves be searched without a warrant[.]"[207] Treble confusion was the result. Justice Powell's opinion seemingly had the very purpose of muddying the waters; bricks of marijuana wrapped in plastic were hardly the sort of luggage that deserved more constitutional protection than the automobile from which they were seized. But the bricks were protected because they were "sealed in a manner

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[202] *Id.* at 428.
[203] *Id.* at 426.
[204] *Id.* at 425 (quoting United States v. Chadwick, 433 U.S. 1, 11 (1977)).
[205] *Id.* at 432 (Powell, J., concurring).
[206] *Id.* at 429.
[207] *Id.* at 423.

manifesting a reasonable expectation" of privacy. So viewed, *any* opaque container would enjoy the protections of the warrant requirement; but if that were so, why had Powell written separately?

Justice Stewart then added his retirement to Powell's inscrutability and Burger's silence. The Court had clarified the search-incident rule and further clouded the automobile exception, when the search-incident rule had already been reasonably clear but the automobile exception thoroughly confused. The police needed both probable cause and a warrant to open Robbin's parcels of marijuana, but neither probable cause nor a warrant to open Belton's jacket. Given that a zippered pocket in a jacket seems more intimately private than wrapped packages, *Belton* and *Robbins* were two scorpions in a small bottle. One or the other had a distinctly limited life expectancy.

As it happened, *Belton* stung *Robbins*. The Court handed down *United States v. Ross*[208] just eleven months after the decisions in *Belton* and *Robbins*, in a volume of the U.S. reports that begins with the Court's tribute to the retirement of Potter Stewart. In *Ross*, District of Columbia police received a tip from an informant who had previously supplied reliable information.[209] The informant indicated that a man called Bandit was selling drugs out of a maroon Chevrolet Malibu parked at 439 Ridge Street, that the informant had just witnessed a sale, and that Bandit had told the informant that there were more drugs in the trunk of the car.[210]

Police responded to the tip and discovered a maroon Malibu parked at 439 Ridge Street.[211] A records check revealed that it belonged to one Albert Ross, that Ross met the description the informant gave of Bandit, and that Ross went by the name of Bandit. But there was no one in the car.[212]

Police drove by again five minutes later, and noticed the

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[208] 456 U.S. 798 (1982).
[209] *Ross*, 456 U.S. at 800.
[210] *Id.*
[211] *Id.*
[212] *Id.*

Malibu in traffic.[213] They pulled alongside, and the driver matched the description given by the informant.[214] The police pulled the car over and ordered Ross out of the car.[215] A search of the passenger compartment revealed a bullet on a seat and a pistol in the glove compartment.[216] Thereupon the police placed Ross under arrest and handcuffed him.[217]

Using Ross's key, an officer opened the trunk.[218] Inside they saw a paper bag and a zippered red leather pouch.[219] An officer opened the bag and discovered bags of white powder, which proved to be heroin.[220] The police then closed the trunk and drove the car to headquarters.[221] There, they opened the pouch and discovered $3,200 in cash.[222] Both the cash and the drugs were introduced as evidence against Ross.[223]

On appeal, a panel of the D.C. Circuit held that the warrantless search of the pouch violated the Fourth Amendment, but that the search of the paper bag was lawful.[224] The circuit court then reheard the case *en banc*.[225] Then-judge Ginsburg wrote for the majority, holding that *Sanders* compelled suppression of the evidence in the pouch and that no distinction could be drawn between the pouch and the paper bag, so that the heroin evidence must be suppressed as well.[226]

Judge Tamm, in dissent, marshalled several pages of citations to cases in which the lower courts had distinguished various effects discovered in automobiles, finding a reasonable ex-

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[213] *Id.* at 801.
[214] *Id.*
[215] *Id.*
[216] *Id.*
[217] *Id.*
[218] *Id.*
[219] *Id.*
[220] *Id.*
[221] *Id.*
[222] *Id.*
[223] *Id.*
[224] United States v. Ross, 655 F.2d 1159, 1161 n.2 (D.C. Cir. 1981) (en banc), *rev'd*, 456 U.S. 798 (1982).
[225] *Ross*, 655 F.2d at 1161 n.2.
[226] *Id.* at 1161.

pectation of privacy in luggage but none in bags and boxes.[227] But the cases were hardly consistent; some of them treated bags and boxes as private, triggering the warrant requirement.[228] To distinguish the paper bag from the red leather pouch would be to pick a very small nit indeed. In any event, *Robbins* would soon come down, rejecting any distinction between species of containers. Judge Tamm apprehended that, with their ruling on the paper bag, his colleagues were "descending from disarray to chaos",[229] but chaos already seemed to be the order of the day.

Judge Robb suggested a way out of the thicket. The confusion about the scope of the warrant requirement, he wrote, "follows from a rule which creates search-resistant cells or compartments in an area otherwise lawfully subject to search."[230] He continued:

> [T]he right to search an automobile should include the right to open any container found within the automobile, just as the right to search a lawfully arrested prisoner carries with it the right to examine the contents of his wallet and any envelope found in his pocket, and the right to search a room includes authority to open and search all the drawers and containers found within the room.[231]

But this approach, as Judge Robb acknowledged, was precluded by *Chadwick* and *Sanders,* which he read as recognizing "search-resistant cells" within automobiles "otherwise lawfully subject to search."[232]

The Supreme Court followed Judge Robb's approach without quite overruling *Chadwick* and *Sanders.* Justice Stevens

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[227] *Id.* at 1174-76 (Tamm, J., dissenting).

[228] *See* United States v. Dien, 609 F.2d 1038, 1044 (2d Cir. 1979) (holding that cardboard boxes sealed with tape and located behind opaque windows trigger the warrant requirement), *adhered to on reh'g*, 615 F.2d 10 (2d Cir. 1980); Liichow v. State, 419 A.2d 1041, 1045 (Md. 1980) (holding that warrant was needed to search a plastic bag).

[229] *Ross*, 655 F.2d at 1171 (Tamm, J., dissenting).

[230] *Id.* at 1180 (Robb, J., dissenting).

[231] *Id.* (Robb, J., dissenting).

[232] *Id.* (Robb, J., dissenting).

wrote an opinion joined by six Justices. The majority reasoned that the automobile exception operates as a substitute for a warrant, authorizing the search of a car just as if a magistrate had issued a warrant for that purpose.[233] Just as "a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers and containers in which the weapon might be found", so a "warrant to search a vehicle would support a search of every part of the vehicle that might contain the object of the search."[234] Thus, "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search."[235]

In *Chadwick* and *Sanders*, however, the police had probable cause to search the containers, but not the vehicles. Granting that "[t]he rationale justifying a warrantless search of an automobile that is believed to be transporting contraband arguably applies with equal force to any movable container that is believed to be carrying an illicit substance," the majority concluded that *Chadwick* had "squarely rejected" that proposition.[236] Thus, in a case in which the police had probable cause to believe that a suspect had contraband in a particular container, they could not circumvent the warrant requirement by waiting for the suspect to place the container in a car.

But this was not much of a reservation, for in such a contraband-in-a-container case the police by hypothesis have probable cause to arrest the suspect. Police with the patience to wait for the suspect's entry into a vehicle before effecting the arrest may then search any container in the passenger compartment under *Belton*. Under *Robinson,* those who arrest at once can search any container in the suspect's immediate pos-

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[233] United States v. Ross, 456 U.S. 798, 823 (1982) ("The scope of a warrantless search based on probable cause is no narrower—and no broader—than the scope of a search authorized by a warrant supported by probable cause. Only the prior approach of the magistrate is waived; the search otherwise is as the magistrate could authorize.") (footnote omitted).

[234] *Id.* at 821.

[235] *Id.* at 825.

[236] *Id.* at 809-10.

session.

Still, cases arose at the border between *Ross* and *Sanders*. In the 1985 case of *Oklahoma v. Castleberry*,[237] an equally divided Court affirmed a state court that had ruled that when police had probable cause to believe that the suspect had drugs in blue suitcases, they needed a warrant to open the suitcases after the luggage had been seized from the trunk of the suspect's car.[238] The lower court had reasoned that if the police had known only that the suspect had drugs in his car, without knowing precisely where, the search would have been legal.[239] However, because the police knew *more*, they needed a warrant.[240]

Almost ten years after *Ross*, the Court took the case of *California v. Acevedo*.[241] In *Acevedo*, a man named Daza, under police surveillance, picked up a Federal Express package the police knew to contain marijuana.[242] Daza took the package to his home.[243] Two hours later, Acevedo entered the apartment and left with a paper bag the same size as the packages of marijuana Daza had received.[244] Acevedo placed the bag in the trunk of this car and drove off, whereupon the police stopped his car, opened the trunk and then the package and discovered marijuana.[245]

The majority, per Justice Blackmun, a lonely dissenter in *Chadwick*, found the case indistinguishable from *Ross*.[246] How could Acevedo have a greater privacy interest in the paper bag in the trunk of his car than Ross had had in the paper bag in the trunk of *his* car? How could the burden of obtaining a warrant be any greater for the California police in *Acevedo* than it

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[237] 471 U.S. 146 (1985).

[238] *Castleberry*, 471 U.S. at 146.

[239] Castleberry v. State, 678 P.2d 720, 724 (Okla. 1984), *aff'd*, 471 U.S. 146 (1985).

[240] *Castleberry*, 678 P.2d at 724.

[241] 500 U.S. 565 (1991).

[242] *Acevedo*, 500 U.S. at 567.

[243] *Id.*

[244] *Id.*

[245] *Id.*

[246] *Id.* at 572.

had been for the D.C. police in *Ross*?

Justice Stevens, the author of *Ross*, dissented in *Acevedo*.[247] How could the police need a warrant to search the bag while Acevedo was walking toward his car, but not need a warrant the moment the suspect entered the vehicle? Justice White, long the critic of the warrant-clause approach, endorsed the Stevens position.

In truth, there is no difference in an individual's privacy interest in a container on the street or in a car. Indeed, there is no difference between the privacy of a locked glove compartment and a locked brief case. Nor are containers any less mobile, or any more burdensome to impound pending the issuance of a warrant, than are automobiles. The long-recognized automobile exception had almost no distinctive doctrinal content; it was only the occasion for a judicial struggle over the value of warrants. Late and early, an expansive interpretation of the exception turned on skepticism about whether warrants provided enough protection for the privacy of the law-abiding to justify the time and trouble required to obtain one.

After struggling to answer that question in narrow rulings, the need for a determinate Fourth Amendment jurisprudence drove the Court in the direction of bright-line rules. Such rules by nature are over-inclusive or under-inclusive; they err either on the side of the government or of the suspect. Rather than permit the exclusionary rule to deprive the public of just convictions, the Court opted for rules that are over-inclusive of legitimate law-enforcement needs. The dissenting opinions reflect the price that was paid in legitimacy for the advance in clarity.

In *Acevedo*, Justice Blackmun echoed Justice White's argument in *Chambers:* "[s]ince the police, by hypothesis, have probable cause to seize the property, we can assume that a warrant will be routinely forthcoming in the overwhelming majority of cases."[248] In *Ross*, Justice Marshall accused the

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[247] *Id.* at 585 (Stevens, J., dissenting).

[248] *Id.* at 575 (quoting Arkansas v. Sanders, 442 U.S. 753, 770 (1979) (Blackmun, J., dissenting)).

majority of nurturing a "probable cause exception"[249] to the warrant requirement. Excluding searches of private premise, the charge is substantially accurate.[250] The "extreme view of the Fourth Amendment" urged by Bork and Easterbrook, supported by "dubious legal arguments" that the *Chadwick* Court "unanimously reject[ed]", had become the prevailing law.

III. LEGITIMACY AND DETERMINACY IN THE REHNQUIST COURT: THE IRON TRIANGLE OF *WHREN*, *BELTON*, AND *ATWATER*

Strictly speaking, *Acevedo* came down after William Rehnquist replaced Warren Burger as Chief Justice. Nonetheless it is useful to characterize the Fourth Amendment jurisprudence from *Robinson* to *Acevedo* as of a piece. The Court during this period slowly but surely abandoned the warrant requirement outside of private premises, and in doing so reflected a heightened sense of the need for clarity and a flexible understanding of legitimacy derived partly from precedent and partly from an understanding of shared contemporary values about privacy.

During the 1990's, however, the Rehnquist Court moved toward an understanding of legitimacy derived from the original understanding of the Fourth Amendment, as evidenced by common-law practice at the time of the founding. Justice Scalia championed this approach, and over time won over a working majority of his colleagues. Yet the Court remains more committed to clarity than to legitimacy.

The key ruling is *Atwater v. City of Lago Vista*.[251] Justice Souter's majority opinion summarized the relevant facts as follows:

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[249] United States v. Ross, 456 U.S. 798, 828 (1982).

[250] One can devise a hypothetical where a warrant would still be required out-of-doors. Suppose the police have probable cause to believe that Suspect A has mailed a package of drugs to Suspect B. If the police stop the mailman and search the package to confirm their suspicion, they have neither a warrant to search the package, nor probable cause to arrest the mailman. If the mailman is on foot, the automobile exception doesn't apply. But this is more of an exercise in legal ingenuity than an illustration with practical significance.

[251] Atwater v. City of Lago Vista, 532 U.S. 318 (2001).

In March 1997, petitioner Gail Atwater was driving her pickup truck in Lago Vista, Texas, with her 3-year-old son and 5-year-old daughter in the front seat. None of them was wearing a seatbelt. Respondent Bart Turek, a Lago Vista police officer at the time, observed the seatbelt violations and pulled Atwater over. According to Atwater's complaint (the allegations of which we assume to be true for present purposes), Turek approached the truck and "yell[ed]" something to the effect of "[w]e've met before" and "[y]ou're going to jail." [Turek had previously stopped Atwater for what he had thought was a seatbelt violation, but had realized that Atwater's son, although seated on the vehicle's armrest, was in fact belted in. Atwater acknowledged that her son's seating position was unsafe, and Turek issued a verbal warning.] He then called for backup and asked to see Atwater's driver's license and insurance documentation, which state law required her to carry. When Atwater told Turek that she did not have the papers because her purse had been stolen the day before, Turek said that he had "heard that story two-hundred times.

Atwater asked to take her "frightened, upset, and crying" children to a friend's house nearby, but Turek told her, "[y]ou're not going anywhere." As it turned out, Atwater's friend learned what was going on and soon arrived to take charge of the children. Turek then handcuffed Atwater, placed her in his squad car, and drove her to the local police station, where booking officers had her remove her shoes, jewelry, and eyeglasses, and empty her pockets. Officers took Atwater's "mug shot" and placed her, alone, in a jail cell for about one hour, after which she was taken before a magistrate and released on $310 bond.

Atwater was charged with driving without her seatbelt fastened, failing to secure her children in seatbelts, driving without a license, and failing to provide proof of insurance. She ultimately pleaded no contest to the misdemeanor seatbelt offenses and paid a $50 fine; the other charges were dismissed.[252]

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[252] *Atwater*, 532 U.S. at 323-325 (citations and footnotes omitted).

Atwater sued for damages under 42 U.S.C. § 1983. The district court granted the city's summary judgment motion, and the Court of Appeals for the Fifth Circuit, sitting en banc, affirmed the grant of summary judgment over three dissenting votes.[253] The Supreme Court in turn affirmed: "If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender."[254].

The case is illuminating for at least three reasons. First, Atwater's claim had strong support in the common law, because various authorities declared the rule to be that a warrantless arrest for a misdemeanor was impermissible unless the misdemeanor involved a breach of the peace.[255] Second, the facts of Atwater's case were extremely sympathetic. The majority opinion itself declares:

> If we were to derive a rule exclusively to address the uncontested facts of this case, Atwater might well prevail. She was a known and established resident of Lago Vista with no place to hide and no incentive to flee, and common sense says she would almost certainly have buckled up as a condition of driving off with a citation. In her case, the physical incidents of arrest were merely gratuitous humiliations imposed by a police officer who was (at best) exercising extremely poor judgment. Atwater's claim to live free of pointless indignity and confinement clearly outweighs anything the City can raise against it specific to her case.[256]

Third, because a lawful arrest carries with it the power to search incident to arrest, and often as a practical matter triggers the right to impound a vehicle and conduct an inventory search, *Atwater* has an obvious and perverse relationship with the cases governing searches-incident-to-arrest and inventory

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[253] *Id.* at 325-26.

[254] *Id.* at 354.

[255] *See id.* at 328-31 (noting views of, *inter alia*, James Fitzjames Stephen, William Blackstone, and Glanville Williams).

[256] *Id.* at 346-47.

searches.[257]

Thoughtful critics have denounced the decison,[258] and I have no purpose to flagellate a defunct equine. What I have to add to what has been written about *Atwater* is that the decision illustrates both the urgent need for bright-line rules in the Fourth Amendment context, and the inherent tension between clarity and legitimacy. The majority opinion explicitly rests on the need for determinacy; history is treated as not requiring a holding for Atwater and thus permitting the play of interest-balancing. Balancing the interests of the citizen against law enforcement's need for guidance, the majority inclines in favor of law enforcement:

> [W]e have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review. Often enough, the Fourth Amendment has to be applied on the spur (and in the heat) of the moment, and the object in implementing its command of reasonableness is to draw standards sufficiently clear and simple to be applied with a fair prospect of surviving judicial second-guessing months and years after an arrest or search is made. Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules.[259]

Thirty years have passed since the *Robinson* case, and eight of the nine justices then sitting have left the Court. The primacy

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[257] This implication, illuminatingly, was made explicit *by the dissent*. *See id.* at 371-72 (O'Connor, J., dissenting) (noting that "unbounded discretion" to issue citation or make arrest followed by search-incident and inventory search "carries with it grave potential for abuse.").

[258] *See generally,* Thomas Y. Davies, *The Fictional Character of Law-and-Order Originalism: A Case Study of the Distortions and Evasions of Framing-Era Arrest Doctrine in* Atwater v. Lago Vista, 37 WAKE FOREST L. REV. 239 (2002); Richard S. Frase, *What Were They Thinking? Fourth Amendment Unreasonableness in* Atwater v. City of Lago Vista, 71 FORD. L. REV. 329 (2002).

[259] *Atwater*, 532 U.S. at 347 (citations omitted).

of determinacy remains.

I turn now to assess how the interaction of the bright-line rules the Court has crafted in this area undermine legitimacy, whether we conceive of legitimacy in contemporary or historical terms.

IV. THE LEGITIMACY DEFICIT, *OR,* THE SUPREME COURT'S IRON TRIANGLE

The regime announced in *Belton* and *Acevedo* had certain attractive points. First, it was relatively clear. Police with probable cause to believe that a person had committed an offense had constitutional power to arrest such a person. They may do this outdoors, on the road, or on public premises without a warrant. If they wish to enter private premises to make the arrest, they need a warrant authorizing the entry. Incident to the arrest, they may search the person of the suspect, including any containers thereon. The search-incident power extends to the area of the suspect's immediate control, categorically defined by *Belton* to include the passenger compartment, but not the trunk, or the vehicle which the arrested person had occupied. Under *Ross* and *Acevedo*, police having probable cause to believe evidence or contraband could be found in a vehicle need no warrant to search the vehicle, and this search may extend to any area of the vehicle or any container in the vehicle where the suspected item might be.

Second, the regime, if scrupulously enforced, struck a not implausible balance between the security of the citizen and the government's law enforcement interests. Absent probable cause, the police could not search incident to arrest (for the arrest would be tainted and so too its fruits) or search (for *Ross* and *Acevedo* recognize an exception to the warrant requirement, not to the probable cause requirement). The rules generally favored the police but imposed some restrictions on them as well. Under *Ross* the police could not search for a stolen television in the glove box, and under *Belton* they could not search the trunk incident to an arrest.

A warrant requirement would impose additional costs on the police before undertaking either search or arrest. This

would give the police incentives to refrain from borderline searches and arrests. If the Court is right, however, that home invasion constitutes the most serious assertion of public power, at least so long as personal detention following arrest is brief, then it makes sense to reserve the most costly procedural hurdle for the most sensitive individual interest.

The most salient liability to the *Belton/Acevedo* regime was the risk that the police might arrest people for the purpose of authorizing a search for evidence. *Robinson* itself adopts the premise that arrest is a greater intrusion than search.[260] So indeed it is, especially in public, when the arrest destroys one's liberty but the attendant search does not disturb one's home. If police lack the probable cause required by *Acevedo*, they may be tempted to jump to the more intrusive arrest as a way of authorizing the otherwise forbidden search.

That risk has materialized, largely because the Court has formulated categorical rules in isolation from each other. The three important rules, in this case, constitute what I call the Supreme Court's Iron Triangle. *Belton* authorizes thorough search of the person and the passenger compartment incident to arrest, even though the charge is failure to pay child support and the search is of a fishing tackle-box. The decision in *Whren v. United States*[261] held that police motives for a stop are irrelevant so long as the requisite probable cause or reasonable suspicion is present, even when Vice Squad officers stop a suspected drug dealer for driving at an unreasonable speed.[262] The last leg in the Iron Triangle is *Atwater*, holding that the Fourth Amendment permits the arrest of persons suspected on probable cause of committing any offense, even a misdemeanor for which no jail time is authorized and even when there is no apparent risk of flight or repeated offending. Each leg of the

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[260] *See* United States v. Robinson, 414 U.S. 218, 235 (1973) ("It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.").

[261] 517 U.S. 806 (1996).

[262] *Whren*, 517 U.S. at 813.

triangle is supported primarily by the need for bright-line rules.[263]

The Court's decision in *Arkansas v. Sullivan*,[264] upholding the inventory search of the vehicle of a motorist arrested for speeding, driving without registration, improperly tinted windows, and carrying a weapon (a rusted roofing hatchet), confirms that the majority of the Court is not disposed to rethink any leg of the triangle.[265] The *Sullivan* opinion was unanimous and rendered *per curiam,* but the four *Atwater* dissenters joined a concurrence by Justice Stevens to express "hope" that "the Court will reconsider its recent precedent."[266]

The Iron Triangle means in practice that the police have general search power over anyone traveling by automobile. No one disputes the proposition that full compliance with all traffic regulations is impossible for any significant distance. *Atwater* authorizes the driver's arrest as soon as police observe the first infraction. *Robinson* authorizes the full search of the driver's person including any containers, and *Belton* extends this authority to the passenger compartment of the vehicle, including containers.

The search-incident-to-arrest is, within its physical compass, general; it is not premised on probable cause but, under *Robinson*, flows automatically from the fact of arrest. The inventory search of the entire vehicle, the trunk and any containers therein, is likewise general, and likewise authorized by the Court's decisions. Determinacy has been achieved, but only at the price of legitimacy.

This Part assesses the legitimacy of the *combined* effects of the bright-line rules announced in *Belton, Whren* and *Atwater.*

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[263] The Court in each instance says as much. In *Whren* Justice Scalia's majority opinion states that the "principal basis" for the decisions excluding subjective motivation from bearing on Fourth Amendment reasonableness "is simply that the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent." *Id.* at 814 (citing *Robinson*, 414 U.S. at 236).

[264] 532 U.S. 769 (2001) (per curiam).

[265] *Sullivan*, 532 U.S. at 769-72.

[266] *Id.* at 773 (Stevens, J., concurring).

I begin by considering legitimacy from the conventional viewpoint of the Burger Court, *i.e.,* whether Fourth Amendment law comports with widely-shared social judgments of reasonableness. I turn then to consider the current Fourth Amendment regime from the perspective of the new historicism, which measures legitimacy according to the Founders' views of reasonableness as reflected in the common law.

A. Bright-Line Rules and the Fallacy of Composition: Legitimacy as Shared Values

Legal rules prescribe an official response to facts defined in advance as necessary and sufficient to trigger that response. Rules thus match first-order policy judgments only imperfectly; they will be both under-inclusive (leaving out cases that in fact fit the background justifications for the rule) and over-inclusive (including some cases that do not fit the background justifications for the rule). For example, consider a rule that prohibits bringing a dog into a restaurant. The background justification for the rule is that dogs can disturb other diners by barking or by unwanted physical contact.

The rule is both over-inclusive and under-inclusive. It includes even well-behaved canines, even seeing-eye dogs. It excludes many other cases that meet the background justification for the rule (noise and disturbance), such as obnoxious children or other pets.

The rule may be justified, however, if the problem area makes case-specific application of the background justifications unreliable (how can the maitre de determine which dogs are well-behaved and which are not?), if there is a strong need for certainty given the volume of cases and the costs of error, or if both the reliability and determinacy points apply at the same time.

When over-inclusive rules are overlaid on one another, however, the risk of misapplying the background justifications greatly increases. Suppose rule 1 provides that all cases presenting fact A are to be given X treatment, and rule 2 provides that in every instance of X treatment officials shall follow policy Y. If fact A justifies policy Y treatment X on first-order con-

siderations two thirds of the time, and X treatment also justifies policy Y two thirds of the time, fact X will trigger policy Y even though policy Y is justified in only one third of all cases presenting fact X.

Take the dogs in restaurants example. Suppose that the need for certainty and the difficulty of case-by-case application of the background justifications justifies a no-dogs-in-restaurants rule. Suppose now that similar considerations call for defining "restaurant" in categorical terms, such as "any structure where food is served to more than ten persons unrelated by blood or marriage." Standing alone, both rules make sense. If one puts the two rules together, dogs are prohibited at school picnics and family reunions staged under the pavilion of a city park.

This is precisely what has happened with police powers over motorists. If we state the governing law openly—the police may arrest anyone operating an automobile when they wish, and then search the car (the passenger compartment immediately, the trunk after impoundment), containers included—our shared values, including those of our legal tradition, would reject such an account as authoritarian and lawless. Yet legality—the case for determinate Fourth Amendment rules—is the very reason why we have arrived at this state of affairs.

The conflict with legitimacy is more than an abstraction. A disturbing number of cases of gratuitous arrests for traffic offenses have been reported, and there is good reason to think that most such cases will not be reported at all. If the police find evidence of drugs or other more serious offenses during the search incident or the inventory search, the case will not be written up as traffic. And if the police find nothing more serious, the particular facts and circumstances of the arrest will be reported only if the citizen files a complaint or a lawsuit.

Consider, for example, *People v. McKay*.[267] Defendant was arrested for violating California Vehicle Code section 21650.1, "which requires a bicycle to be operated 'in the same direction as the vehicles are required to be driven upon the road-

[267] 41 P.3d 59 (Cal. Ct. App. 2002).

way."[268] During the search incident to the arrest, the arresting officer discovered methamphetamine in defendant's sock.[269] On appeal of the denial of his motion to suppress, the defendant attempted to distinguish *Atwater* on the ground that California law prohibited, rather than authorized, arrest.[270]

The Supreme Court of California rejected this view, giving two reasons. First, a violation of state law limiting police arrest powers does not change federal constitutional law.[271] Citing a long line of authority (and discussing the few bits of contrary authority), the *McKay* court concluded that "so long as the officer has probable cause to believe that an individual has committed a criminal offense, a custodial arrest—even one effected in violation of state arrest procedures—does not violate the Fourth Amendment."[272] Whatever remedy might be available under the state statute, the defendant could not invoke the exclusionary rule, which the California state constitution confines to the minimum requirements of the federal constitution.[273]

Second, the California statute governing arrests for traffic infractions authorizes arrest if the offender fails to produce a driver's license or other satisfactory evidence of identification.[274] Not surprisingly, McKay was not carrying his driver's license while cycling.[275] The *McKay* court, however, concluded that the officer was not required to accept the defendant's word as to his identity, even though McKay did identify himself sufficiently for the police to run a computer check.[276]

If we check such a result against any plausible measure of community sentiments, the result must be judged illegitimate. The suggestion that riding a bike against traffic on a residen-

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[268] *McKay*, 41 P.3d at 63 (quoting CAL. VEH. CODE § 21650.1 (2002)).
[289] *Id.* at 63.
[270] *Id.* at 64.
[271] *Id.* at 71.
[272] *Id.*
[273] *Id.* at 72.
[274] *Id.*
[275] *Id.* at 63.
[276] *Id.*

tial street calls for arrest and search sounds like something out of a late-night talk-show host's monologue. We have, moreover, at least two very clear measures of society's values that do not depend on subjective impressions of popular opinion. First, police only rarely arrest for traffic offenses.[277] Second, many legislatures have spoken against the practice absent some special justification.[278]

California is not alone in enacting limits on police authority to arrest for minor offenses.[279] Whether a majority of states impose such statutory limits is beside the point, because the administrative practice of avoiding arrests leaves most jurisdictions with no immediate need for legislated limits. The important point is one made in *Atwater* for the purpose of upholding police authority—no state in the union has an official policy of arresting traffic offenders.

The interlocking bright-line rules of the Court's Iron Triangle thus authorize police practices that no American jurisdiction regards as reasonable. Indeed, a rule simply authorizing the police to search automobiles at their whim—without articulable suspicion of any sort—would actually be *less* objectionable than current doctrine. At least a regime of arbitrary search would not require police to curtail the suspect's liberty as a precondition to search.[280] What *Atwater*, *Belton* and

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[277] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 353-54 (2001) (discussing the small number of minor-offense arrests).

[278] *See id.* at 352 (discussing police interest in limiting minor-offense arrests); Frase, *supra* note 258, at 410-11 (discussing various state approaches).

[279] *See, e.g., Atwater*, 532 U.S. at 352 ("Many jurisdictions, moreover, have chosen to impose more restrictive safeguards through statutes limiting warrantless arrests for minor offenses.").

[280] As Professor LaFave points out, the Court's rejection of any police authority to search incident to citation in *Knowles v. Iowa*, 525 U.S. 113 (1998), implies that the scope of police authority during a traffic stop flows from what the police in fact did, not what they might have done. *See* Wayne R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843, 1869 (2004). It follows that to enjoy *Belton* search-incident authority the police must contemporaneously subject the motorist to the custodial arrest authorized by *Atwater*.

I have previously argued that civil liberties law should place much less emphasis on informational privacy, and much more emphasis on behavioral auton-

Whren encourage is the practice of making unnecessary arrests in bad faith for the ulterior purpose of search, and thereby inflicting handcuffs and arrest records as well as invasions of privacy on petty offenders.

The *Atwater* majority consoled itself with the hope that police have not exploited the overbreadth of the combined rules.[281] It hardly seems like a point in favor of legitimacy, however, to say that the practice approved in the instant case is so outrageous that we can trust the police not to do much of it.

B. Bright-Line Rules and Legitimacy as History

The *Atwater* majority opinion devotes many pages to fending off Ms. Atwater's historical argument.[282] This discussion reflects the Court's recently-heightened sensitivity to founding-era common-law practice as a guide to understanding the Fourth Amendment's general language. It also, in my judgment, makes a powerful case against the general practice of consulting specific common-law rules as reference points for Fourth Amendment jurisprudence.

Atwater argued that many common-law authorities believed that warrantless misdemeanor arrests were permissible only when committed in the presence of the arresting officer and only when the offense involved a breach of the peace.[283]

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omy, in light of the threat of mass-casualty terrorism. *See* Donald A. Dripps, *Terror and Tolerance: Criminal Justice for the New Age of Anxiety,* 1 OH. ST. J. CRIM. L. 9 (2003). Such a model might well approve of police powers to stop and search for the purpose of combating terrorism without individualized suspicion when the authorities have some intelligence about the time and place of an expected attack. It surely does not approve of police authority to search anyone on the road just to see what they might find; and the current doctrine giving the police this authority, *provided they first take the more coercive step of making an arrest*, is an excellent example of how civil-liberties law has short-changed behavioral autonomy.

[281] *See Atwater*, 532 U.S. at 353 ("The upshot of all these influences, combined with the good sense (and, failing that, the political accountability) of most lawmakers and law-enforcement officials, is a dearth of horribles demanding redress.").

[282] *Id.* at 326-45.

[283] *Id.* at 319.

The Court rejected this argument because the common-law authorities were not unanimous[284] and because both in England and America legislatures had adopted statutes authorizing warrantless arrests for various misdemeanors that did not involve breach of the peace.[285]

Now consider the various differences between a founding-era search and seizure case and a contemporary one. First, the institutional context is different, because the modern paramilitary police force was not invented until the middle of the nineteenth century.[286] Second, the remedial context is different, because the exclusionary rule largely has replaced the tort remedy.[287] Third, the legal context has changed, because, while common-law tort cases were subject to statutory overruling, Fourth Amendment cases have constitutional stature and may not be overridden by simple majorities in the legislature.[288]

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[284] *See id.* at 330 ("The great commentators were not unanimous, however, and there is also considerable evidence of a broader conception of common-law misdemeanor arrest authority unlimited by any breach-of-the-peace condition.").

[285] *See id.* at 337 ("During the period leading up to and surrounding the framing of the Bill of Rights, colonial and state legislatures, like Parliament before them, regularly authorized local peace officers to make warrantless misdemeanor arrests without conditioning statutory authority on breach of the peace.") (citations omitted).

[286] *See, e.g.*, George C. Thomas III, *Time Travel, Hovercrafts, and the Framers: If James Madison Sees the Future and Re-Writes the Fourth Amendment*, 80 NOTRE DAME L. REV. (forthcoming June 2005) (manuscript at 25-31).

[287] For example, in *Robinson* then-Justice Rehnquist pointed to the absence of the exclusionary rule in the eighteenth and nineteenth century to explain the paucity of early authority on the scope of the search-incident-to-arrest. *See* United States v. Robinson, 414 U.S. 218, 233 (1973) ("The scarcity of case law before *Weeks* is doubtless due in part to the fact that the exclusionary rule there enunciated had been first adopted only 11 years earlier in Iowa; but it would seem to be also due in part to the fact that the issue was regarded as well settled.") (footnote omitted). How the issue could be "well-settled" without caselaw is a little mysterious; once the exclusionary rule gave defendants an incentive to raise the issue, the law governing search-incident-to-arrest quickly became confused.

[288] Debate about the existence and scope of pre-*Marbury* forms of judicial review continues. *See generally*, Chimel v. California, 395 U.S. 752, 755 (1969) (discussing the convoluted history of the law); Philip Hamburger, *Law and Judicial Duty*, 72 GEO. WASH. L. REV. 1 (2003). There does not, however, seem to be any suggestion that common-law rules as such, without some boost from natural law or what not, had priority over statutes. After all, the Crown *won* Paxton's Case. 1

The institutional and remedial changes are related to each other, because the creation of a full-time police force routinely engaged in searches and arrests could not have been achieved without protections, formal or informal, from tort liability. The shift to the exclusionary rule, coupled as it was with the emergence of large-scale professional police departments, virtually dictates a regulatory perspective on the Fourth Amendment. Given a high volume of cases, a repeat institutional player, and high cost to the public from the imposition of the only available sanction, the case for bright-line rules scarcely could be made any stronger.

The shift to a Fourth Amendment jurisprudence expressed as rules, however, turned the legal ecology upside-down. The common-law tort practice worked case by case. The litigated cases were few, because few search victims had the resources and resolve to sue. The common-law commentators, not surprisingly, sometimes drew different conclusions from the cases that did reach a reported decision.[289] The common law lived with uncertainties and contradictions. The modern world of rules does all it can to avoid them.

When we look to the common-law, then, we are looking at a system that placed a much smaller premium on clarity than the modern system places. Consider *Belton* and *Atwater* in this connection. Suppose we accept the *Atwater* majority's view that common-law history at least gives some support to the legality of warrantless misdemeanor arrests absent breach of the peace. The scope of the search incident to such arrests, at common

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Quincy 402 (Mass. 1755), *reprinted in* M.H. SMITH, THE WRITS OF ASSISTANCE CASE 556-558 (1978) ("*The Justices* were unanimously of Opinion that the Writ might be granted, and some Time after, out of Term, it was granted."). After the Townshend Acts in 1767, the colonial courts outside of Massachusetts managed to avoid issuing general warrants and writs of assistance, but there were a variety of means to this end—sometimes holding the writs illegal without questioning Parliamentary supremacy, sometimes by simple delay, and sometimes with intimations of constitutional priority over legislation. In Massachusetts the courts actually issued the writs. *See* Morgan Cloud, Review: *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1737-38 (1996).

[289] For example, consider the various views of the commentators regarding warrantless arrest absent breach of the peace reviewed in *Atwater*.

law, would have been tested by tort suits against the arresting officers for trespass to chattels. Imagine tort cases involving Robinson's cigarette pack, Belton's jacket pocket, and the armrest of Sullivan's car. It is hard to believe that all of those cases would have come out the same way (especially if we view a low-damages verdict for plaintiff as a win for the police). And yet in the current regime there are good reasons why those cases should come out the same way. The same could be said for the probable cause cases, as distinct from the search-incident cases—Chadwick's footlocker, Sanders's suitcase, Acevedo's paper bag, and so on.

When we stitch together individual bright-line rules, each supposedly supported, or at least not excluded, by the common law, what do we get? We get the Iron Triangle, which authorizes the police to arrest and search the person and effects of anyone traveling by auto (or even by bicycle), without probable cause to search, let alone prior judicial authorization. If we know anything about the Fourth Amendment's history it is that the Framers' abhorred general warrants, but both logic and historical research suggest that *warrantless yet non-actionable* general searches would have been at least as abhorrent to them.[290] Current Fourth Amendment law, however, authoriz-

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[290] In a deeply researched article, Professor Davies concludes that the Fourth Amendment's original meaning was to prohibit Congress from authorizing general warrants and no more. Davies, *supra* note 38. He theorized that the Founders did not intend to regulate warrantless searches and seizures because they assumed that statutory creation of general warrants was the only way officers could circumvent tort liability for searches and seizures (although he points out that a warrant was not always a complete defense to tort liability). *Id.* at 724. He summarized his account of the original understanding as follows:

> The silences of the text regarding warrantless intrusions and when warrants were required or excused were not oversights or defects of drafting. Rather, in the common-law context the Framers had no reason to expect that those topics could become unsettled or controversial. The Framers were content to state the standards for valid warrant authority because they believed that would *suffice* to curb discretionary search and seizure.

Id. (emphasis added). Professor Thomas, similarly, concludes that the Framers expected that warrants would be necessary to enter private premises, whether to search or arrest. *See* Thomas, *supra* note 286, at 37.

es just such general searches.

There is one further joker in the historical deck. The *Atwater* Court emphasized the fact that legislatures both before and after the founding adopted statutes authorizing warrantless misdemeanor arrests absent breach of the peace.[291] The trouble with this claim is that it undermines any reliance on any common-law tort doctrine as a predicate for constitutional doctrine, because all common-law tort doctrine could be overridden by statute. Lord Camden's opinion in the canonical case of *Entick v. Carrington* says quite plainly that a very different case would be present if an act of parliament had conferred on the Secretary of State the power to issue warrants for incriminating papers.[292]

Of course legislatures actually did pass statutes authorizing arrests for nonviolent misdemeanors. Perhaps this shows that the Founders understood the Fourth Amendment to constitutionalize some sacred subset of the common-law tort regime. What subset? History holds no answer to this question. The common-law itself evolved with the confidence that major errors could be corrected by legislation.[293] Founding-era legislative practice, however, fails to define the scope of the consti-

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[291] *See* Atwater v. City of Lago Vista, 532 U.S. 318, 333-38 (2001).

[292] *See* Entick v. Carrington, 19 Howell's State Trials 1029, 1045 (C.P. 1765):

> The question, whether officers or not, involves another; whether the secretary of state, whose ministers they are, can be deemed a justice of the peace, or taken within the equity of the description; for officers and justices are here co-relative terms: therefore either both must be comprised, or both excluded.
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> This question leads me to an inquiry into the authority of that minister, as he stands described upon the record in two capacities, viz. secretary of state and privy counsellor. And since no statute has conferred any such jurisdiction as this before us, it must be given, if it does really exist, by the common law; and upon this ground he has been treated as a conservator of the peace.

Id.

[293] For instance, Blackstone declared that "it is a settled rule at common law, that no counsel shall be allowed a prisoner upon his trial, upon the general issue, in any capital crime, unless some point of law shall arise proper to be debated," but he thought the rule was wrong and "is worthy the interposition of the legislature." 4 WILLIAM BLACKSTONE, COMMENTARIES *355.

tutional limits.

If founding-era legislatures authorized certain searches and seizures (for example, the warrantless searches of ships authorized by the first Congress), we cannot be sure that the legislation respected the understood constitutional limits. The Alien and Sedition Acts offer some evidence that founding-era legislatures could misunderstand the Constitution. A founding-era case upholding, against a Fourth Amendment challenge, a statute authorizing searches or seizures *would* be evidence of contemporary understanding; but we face a dearth of such cases deciding squarely raised Fourth Amendment issues.

Legislative *inaction* is even weaker evidence of constitutional meaning. Until the judiciary limits executive search-and-seizure power, whether by tort or by constitutional rulings, legislatures have no reason to expressly authorize specific law-enforcement practices. Such judicial limits cannot arise until the executive undertakes the challenged practices. So it hardly follows that the failure of founding-era legislatures to authorize *Terry* stops, school searches or airport searches says anything about the constitutionality of such practices.

Prior to the advent of municipal police, public schools and aviation, legislatures had no reason to even consider such practices. We can analogize to the night-watch, or public orphanages or passenger ships; still, does the failure of founding-era legislatures to authorize the close search for weapons of every passenger boarding a passenger ship really signal that modern airport searches are unconstitutional? If there had been a wave of hijackings of passenger ships in the 1790s, and legislatures had authorized such searches, would founding-era courts have struck them down?

History does not answer counterfactual questions. Yet the question of what aspects of the common-law search-and-seizure rules have constitutional status is just such a counterfactual question. Only today's judges can answer such a question. In judging their answer, they must exercise the very sort of subjective reasoning that has been driving the turn to the common law in the first place.

When brought together, the Fourth Amendment rules

pertaining to vehicle searches fail both the test of history and the test of reason. The practical power to arrest and search any traveler, according to the standardless discretion of individual officers, is the sort of practice the Framers detested. It likewise offends widely-shared contemporary judgments about reasonable police practices.

Justice Scalia's concurring opinion in *Thornton* does more to prove than to address the incompatibility of common-law methodology with a determinate Fourth Amendment jurisprudence.[294] He supposed that the common-law did not permit global searches incident to arrest, but instead imposed a requirement that evidence, weapons or contraband might be found during the search.[295] The supposed common-law limitation was not a strict requirement of probable cause, but it is not an automatic right to search either.

There are two problematic aspects to this (admittedly welcome) attack on the Iron Triangle. First, we have no way of knowing that the Framers expected the supposed common-law limitation to have constitutional status, *i.e.* to become by force of the Fourth Amendment invulnerable to contrary legislation. Second, the turn to direct reliance on the common-law, in preference to the crafting of an intermediate layer of bright-line rules crafted by the Court, is significantly underdetermined. The police, incident to arrest, must have some reason—but not probable cause—to suspect evidence, contraband or weapons. That's a standard, not a rule, and a fairly vague standard at that.

The Court eventually might equate the common-law standard with the *Terry* reasonable-suspicion standard.[296] This would be helpful from the standpoint of determinacy because it would give police and lower courts a familiar toolkit with which

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[294] Thornton v. United States, 124 S. Ct. 2127, 2133-38 (2004) (Scalia, J., concurring).

[295] *Thornton*, 124 S. Ct. at 2136 (Scalia, J., concurring).

[296] In Maryland v. Buie, 494 U.S. 325 (1990), the Court made a similar analytical move, by adopting the *Terry* reasonable-suspicion standard to test the justification for a protective sweep of premises after officers have entered and arrested a suspect. *Buie*, 494 U.S. at 327.

to work. Nonetheless, even this move would leave the police and lower courts with little guidance about the scope of the search-incident authority. At least four major uncertainties would be created.

First, a *Terry*-type approach, whether applied to arrests indoors or on the road, would call for case-by-case determinations not just about the scope of the suspect's reach (the *Chimel* test) but about the likelihood that any weapons, evidence or contraband *was in fact in the area searched. Chimel* did not (or at least does not now) require particularized suspicion of this sort; when the suspect is placed under arrest, the police may search drawers and closets within the grabbing range without any reason to think that evidence or a weapon may be there.[297] Second, a *Terry* approach would have to deal with the suspect's physical capabilities, especially as they relate to containers. A backpack (or a briefcase or a toolbox, etc.) in a car may hold marijuana, but how easy would it be for the suspect to grab it and destroy it on the facts of a given case? If a defendant could not have physically reached the evidence at the time of arrest, the police would need to persuade trial

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[297] *See* Chimel v. California, 395 U.S. 757, 763 (1969):

> There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control" construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.
>
> There is no comparable justification, however, for routinely searching any room other that in which an arrest occurs—or for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.

Id. at 763. The apparent implication of this passage is that the "routine" search of the reachable areas is permitted without specific suspicion or any evidence of resistance by the suspect. Subsequently, in *Maryland v. Buie*, the Court dealt with the authority of the police to search a house for possible cohorts of the suspect following the arrest. *Buie*, 494 U.S. at 327. The Court ruled that the police needed *Terry*-type reasonable suspicion to believe that cohorts might be present, but also gave this version of the *Chimel* rule: "We also hold that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id.* at 334. Justice Scalia's approach might therefore undermine *Chimel* as well as *Belton*.

courts that their assessment of the suspect's intentions was not implausible. Third, the test would have to account for what the police might have done differently.[298] If the police learn that they lose the search power once the suspect is handcuffed or locked in the squad car, they may search the suspect (perhaps at gunpoint for security purposes—hardly an ideal arrangement) while the suspect is still in the car or just outside.[299] Does the *Terry* approach require them to curtail their search authority by restraining the suspect?

Fourth, a *Terry* approach would have to be squared with *Ross* and *Acevedo*. In the context of arrests for traffic offenses a *Terry* standard would impose a serious limit the on the search incident power. After all, the police are not likely to find evidence of speeding in a purse or the glovebox. But what about the common case of an arrest for possession of drugs, perceived by the officer during the process of writing a traffic citation? If an arrest now gives the officer the power to search for suspected contraband without probable cause, the probable cause required by *Ross* and *Acevedo* would have to give way to the new standard. Yet it is precisely the concern with using the search-incident power to circumvent the probable cause required for a

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[298] *See* 4 LAFAVE, *supra* note 31, § 6.3(c), at 310 (asking "to what extent are the arresting officers obligated to take measures to narrow the range of the arrestee's control?" LaFave also notes that this problem arises in cases involving indoor arrests, but that the courts generally have not discussed it. *Id.* at 310-11.

[299] United States v. Wesley, 293 F.3d 541 (D.C. Cir. 2002).

> Indeed, to take [defendant's] view would largely render *Belton* a dead letter. The search of a passenger compartment incident to arrest would then be permissible only if the officer left the defendant in the car, in which event the officer would have to crawl over him to effectuate the search, or if the officer removed the defendant but did not (or could not) effectively secure him. As we have previously warned, such a rule "might create a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to the officer." And it would certainly vitiate the Supreme Court's intention to create "a straightforward rule, easily applied, and predictably enforced," by requiring courts to determine retrospectively whether a given arrestee had been so insufficiently secured as to warrant the officer's search of the passenger compartment.

Wesley, 293 F.3d at 548-49.

warrantless search under the automobile exception to the warrant requirement that raises the judicial hackles about *Belton* in the first place.

A majority opinion adopting Justice Scalia's position would not be likely to resolve these issues. They would have to be answered in thousands of cases in the lower courts. Meanwhile, the police would have to guess about the answers they are going to get on motions to suppress. This is the very scenario that played out in the 1980s, to the dismay of law enforcement and the deep concern of the Court.

It may well be that a *Terry*-type rule makes more sense than *Belton* given *Atwater*. It would have made more sense, in my view, to impose some similarly pragmatic limits on the arrest power itself, protecting liberty first and privacy second. The worst feature of *Belton* is the incentive to arrest created by the broad search power. A constitutional rule limiting police power to arrest for nonjailable misdemeanors, of the sort proposed by Professor Frase,[300] would have dealt directly with this problem. But that, if you pardon the pun, is *Atwater* under the bridge. The approach adumbrated by Justice Scalia has clear legitimacy advantages over the Iron Triangle. Whether these justify the cost in determinacy, I argue, is an unavoidable and unattractive choice.

V. The Problem in Perspective: Roots and Responses

A. Acknowledging the Difficulties

The Fourth Amendment cases are difficult because both determinacy and legitimacy are important values. Given the current institutional, remedial and legal environment of Fourth Amendment litigation, the Court's focus on determinacy, for many decades now and under the control of quite various judicial personnel, seems hard to challenge head-on. A return to a tort-type reasonableness analysis on a case-by-case basis is something even harsh critics of contemporary interest balancing seem reluctant to embrace.

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[300] *See* Frase, *supra* note 258, at 410.

If the priority on clarity is a permanent and defensible feature of legal doctrine in this area, we must also acknowledge the institutional limits on the judiciary. The intersection of rules announced in one case with rules announced in another may be hard to change because the two cases came to the Court at different times. Thus Justice Stewart and Justice Powell, who supported the results in *Robinson* and *Belton*, seem to have assumed that *Atwater* should be decided according to Justice O'Connor's dissenting opinion in that case. Neither Stewart nor Powell, however, cast a vote in *Atwater*. *Whren* might have come out the same way in a post-*Atwater* legal context, but unanimity would have been far less likely.

Moreover, courts are multi-person bodies subject to the apparently inexorable laws of collective decision theory. Cycling, path-dependence and intransitive results are the norm, not the exception, for collective decisions.[301] Judicial conventions such as *stare decisis* and standing may reduce, but cannot eliminate, the tendency of groups to reach decisions that would, if made by a single person, be regarded as irrational.[302] What follows are some suggestions about how to reduce or manage the tension between determinacy and legitimacy in the Fourth Amendment context.

B. Some Constructive Suggestions

My suggestions fall into three general areas. First, the Supreme Court can help itself, by taking a larger number of Fourth Amendment cases, in patterns that enable ongoing oversight of what is, for better or worse, an important body of judge-made law. Individual Justices should be more cognizant of the systemic nature of the Fourth Amendment jurisprudence, and accordingly less inclined to announce rules in isolation from the body of law at large, whether the isolated rules are derived from contemporary balances of interests or cribbed

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[301] For an accessible account of Arrow's Theorem, see Hovenkamp, *supra* note 35.

[302] *See* Maxwell L. Stearns, *Standing Back from the Forest: Justiciability and Social Choice*, 83 CAL. L. REV. 1309, 1328-67 (1995).

from the common law. Second, state courts, state legislatures, and police administrators have a role to play here, by developing, both by state constitutional rulings and through the processes of legislation and rule-promulgation, workable rules that are more sensitive to legitimacy considerations than those thus far adopted by the Supreme Court of the United States. Third and finally, legal commentators should do more than we have to focus on the systemic nature of Fourth Amendment doctrine. In particular, the time may have come round for another effort at a Model Code of Pre-Arraignment Procedure.

1. Working With Rules—the Supreme Court Level

From what I have said thus far, my view on some controversial points of Fourth Amendment doctrine should be clear. The Court is perfectly right to announce doctrine in rule-like terms, but it should do so with more sensitivity to how the various rules inter-relate, and it should give up entirely on the project of finding rules of constitutional law in the common law of torts, a jurisprudence that was neither rule-based, nor constitutional, nor static at any given date. I think Professor Amsterdam and Professor Davies have it right; too much has changed to enable modern judges to seek specific guidance from eighteenth-century common law practices.[303] History remains centrally relevant, but at a much higher level of generality—the level of generality that has guided the Court's Fourth Amendment jurisprudence from *Boyd* through the very recent past.

Part of what is driving the Court's turn to history is skepticism about *any* judge-made rules of constitutional law purporting to constrain future decisions more specifically than does the constitutional text itself. Despite thoughtful arguments on the

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[303] *See* Amsterdam, *supra* note 1, at 401 (stating that given the sweeping changes in society, even "if we wanted to take exclusive counsel of the framers on the problems of our time, we could not do so"); Davies, *supra* note 38, at 740-41 ("Applying the original meaning of the Fourth Amendment in a completely changed social and institutional context would subvert the *purpose* the Framers had in mind when they adopted the text.").

other side,[304] I agree with theorists such as Richard Fallon and David Straus, who argue that constitutional law inevitably, and therefore legitimately, includes a layer of judge-made doctrine with political priority over ordinary legislation.[305] The U.S. reports are full of doctrines that invalidate state action absent clearly established violations of the text, and that also uphold state action when a violation of the constitutional text is clear. Examples falling into the first category include the First Amendment overbreadth doctrine[306] and pro-individual burdens of proof in civil commitment[307] and child-custody proceedings.[308] Criminal procedure doctrines in this first category include the presumption of prejudice from the actual or constructive denial of counsel,[309] *Batson*'s rebuttable presumption of discriminatory purpose in the exercise of peremptory challenges,[310] and, of course, *Miranda*.

The second category is less widely discussed but supports the same theoretical case for accepting the legitimacy of judge-

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[304] *See, e.g.,* Akhil Reed Amar, *Foreword: The Document and the Doctrine,* 114 HARV. L. REV. 26, 133-34 (2000) (recognizing legal character of both the text and caselaw interpreting it, but urging that primacy be given the text); Joseph D. Grano, *Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy,* 80 NW. U. L. REV. 100 (1985) (objecting to prophylactic rules on theory that they violate Article III's case-or-controversy requirement).

[305] *See, e.g.,* Richard H. Fallon, Jr., *Foreword: Implementing the Constitution,* 111 HARV. L. REV. 54 (1997); David A. Strauss, *The Ubiquity of Prophylactic Rules,* 55 U. CHI. L. REV. 190 (1988).

[306] *See, e.g.,* Ashcroft v. Free Speech Coalition, 535 U.S. 234, 265-66 (2002) (invoking overbreadth doctrine and invalidating ban on computer-generated images of child pornography).

[307] *See* Addington v. Texas, 441 U.S. 418, 431-33 (1979) (holding preponderance standard unconstitutional in civil commitment proceedings).

[308] *See* Santosky v. Kramer, 455 U.S. 745, 769-70 (1982) (holding that state must satisfy at least the clear-and-convincing evidence standard before terminating parental rights).

[309] *See* Strickland v. Washington, 466 U.S. 668, 692 (1984) ("Actual or constructive denial of the assistance of counsel altogether is legally presumed to result in prejudice.").

[310] *See* Batson v. Kentucky, 476 U.S. 79, 94 (1986) ("Once the defendant makes the requisite showing, the burden shifts to the State to explain adequately the racial exclusion. The State cannot meet this burden on mere general assertions that its official did not discriminate or that they properly performed their official duties.") (citations omitted).

made rules to implement more general constitutional provisions. The qualified-immunity defense in constitutional-tort cases offers one example of the Court creating a safe-harbor for admittedly unconstitutional conduct.[311] The presumption against unconstitutional motivations in prosecutorial charging decisions offers another.[312]

The beginning of wisdom regarding judge-made constitutional doctrine is the premise that errors in the application of the Constitution to particular cases *are inevitable*. *Any* type of constitutional litigation will generate some mistaken rulings for the government and some mistaken rulings for individuals. So long as judge-made doctrine about procedures and remedies makes a good-faith effort to strike a reasonable balance between the two types of errors, it seems not merely permitted, but indeed required, by fidelity to the constitutional text.

I have, however, some further suggestions based on the procedural character of the Court's work in this area. Given the admitted need for bright-line rules, and the dangers that attend announcing such rules on a case-by-case basis, there is some reason to hope that the Supreme Court would take more, rather than fewer, Fourth Amendment cases (or at least more Fourth Amendment *questions*, a point to be explained shortly); and that these cases (or questions) should, when the cert pool permits, be taken, argued and decided together.

The model I have in mind is the Fifth Amendment litigation that produced *Miranda v. Arizona*.[313] Moved by widespread dissatisfaction with existing confessions law, and by recent innovations in both Fifth and Sixth Amendment doctrine, the Court granted certiorari in five cases.[314] The range

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[311] *See, e.g.*, Anderson v. Creighton, 483 U.S. 635, 646 (1987) (applying immunity defense to warrantless search of plaintiffs' home); Malley v. Briggs, 475 U.S. 335, 344-45 (1986) (applying qualified immunity defense to officer who sought arrest warrant for plaintiff on facts allegedly falling short of probable cause).

[312] *See* United States v. Armstrong, 517 U.S. 456, 464 (1996) (stating that "'[t]he presumption of regularity supports' their prosecutorial decisions and, 'in the absence of clear evidence to the contrary, courts presume that they have properly discharged their official duties.'") (citations omitted).

[313] 384 U.S. 436 (1966).

[314] For a review of the *Miranda* litigation in the Supreme Court, see DRIPPS,

of views put forward by the parties and *amici*, together with the varied but representative facts of the cases at bar, provided an extremely thorough review of the field. As I have previous remarked, "no administrative agency could have generated a more thorough or more thoughtful survey of the confessions problem."[315]

The result—the *Miranda* rules—remain controversial to this day. The compromise struck by the *Miranda* litigation, however, is at least based on a comprehensive assessment of police interrogation as a systemic practice raising recurring issues. Might not such a systemic approach make sense in the Fourth Amendment context?

The volume of Fourth Amendment litigation is at least as great as the volume of confessions litigation. In dealing with an open Fourth Amendment issue—say, the scope of police search powers in a *Belton* case regarding the persons and effects of third-parties in the company of the arrested motorist—the Court should take several cases whenever possible. Moreover, because Fourth Amendment cases increasingly present questions that depend on the inter-relationship among rules, the cert grant should invite the parties to argue for the modification of established doctrine. Such an approach would make it easier to take a systemic view of the issues presented in particular cases. For instance, a case like *Sullivan* presented an excellent opportunity to reconsider the plausible idea of suppressing contraband discovered during a search justified by the risk of weapons or of false claims for lost property. Given the settled law contrary to their positions, litigants have little incentive to challenge old rules in light of new ones. That sort of challenge, however, is called for, on an ongoing basis, by the Fourth Amendment of rules.

The evolution of the Iron Triangle offers compelling proof of the dangers of taking one Fourth Amendment case at a time. In *Robinson* and *Gustafson*, the Court assumed without deciding that the arrests supporting the searches were neither "un-

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supra note 3, at 78-79.

[315] *Id.* at 78.

reasonable seizures" nor motivated by the desire to circumvent the probable cause required to search for evidence.[316] *Whren* did not involve search incident to a pretextual *arrest*, but a plain-view discovery incident to a pretextual but nonetheless less-intrusive *stop*.[317] *Atwater* involved a civil action for damages, not a motion to suppress the fruits of a search incident to an unlawful arrest.[318] Case-by-case creation of bright-line rules has led to a body of doctrine that permits bad-faith arrests for petty offenses to secure evidence absent probable cause to search. Yet in no case has the Court actually dealt with a motion to suppress evidence discovered during a search incident to an arrest for a traffic offense; even *Sullivan* involved an inventory search, not a search incident to arrest.[319]

We now face a situation in which the various legs of the Iron Triangle may prove difficult to reconsider. Litigants have little incentive to expressly ask the Court to overrule recent precedent, so long as the likely result is a replay of the original (*Sullivan*, for example, simply replicates *Atwater*). The Court, in turn, is unlikely to rule on a ground that was not addressed by the parties.

Thornton v. United States illustrates the limitations of case-by-case formulation of bright-line rules.[320] The case might well have done no more than demarcate one of the *Belton* rule's boundaries, with good points made by both the majority and dissenting opinions. Justice Scalia, however, joined by Justice Ginsburg, took the occasion to express serious concerns about the Iron Triangle:[321]

> As one judge has put it: "[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to

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[316] *See supra* note 109 and accompanying text.

[317] *Whren*, 517 U.S. at 806.

[318] *See supra* notes 251-56 and accompanying text.

[319] Arkansas v. Sullivan, 532 U.S. 769-70 (2001) (per curiam). Likewise, the recent decision in *Illinois v. Caballes*, 125 S. Ct. 834 (2005), upheld the use of a narcotics-detecting dog, not itself a Fourth Amendment search, incident to, and within the temporal duration of, a traffic stop rather than an arrest.

[320] Thornton v. United States, 124 S. Ct. 2127 (2004).

[321] *Thornton*, 124 S. Ct. at 2133 (Scalia, J., concurring).

> place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find." I entirely agree with that assessment.[322]

The majority, however, took the view that because neither the parties nor the court below had argued for a modification of *Belton* that "[w]hatever the merits of Justice Scalia's opinion concurring in the judgment, this is the wrong case in which to address them."[323] Justice O'Connor concurred, expressing sympathy with Scalia's view but also expressing "reluctan[ce] to adopt it in the context of a case in which neither the Government nor the petitioner has had a chance to speak to its merit."[324]

There are a variety of good reasons why courts should hesitate to decide questions not squarely presented by the instant case. Professor Sunstein, perhaps, has expressed these views most forcefully.[325] Narrow rulings permit the Court to change course, thus reducing the risk of a catastrophic mistake.[326] They both reduce the risk of a political backlash against the courts, and permit legislative intervention, which may make constitutional litigation unnecessary.[327]

These considerations, however, have far less force in the criminal procedure area than they may in other areas of constitutional law. The constitutional law regulating police governs millions of police-citizen encounters every year; the Court's turn to bright-line rules implicitly recognizes the likely futility and inconsistency of case-by-case adjudication in this area.[328]

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[322] *Id.* at 2135 (Scalia, J., concurring) (quoting United States v. McLaughlin, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring)).

[323] *Id.* at 2132 n.4.

[324] *Id.* at 2132 (O'Connor, J., concurring).

[325] *See generally* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999) (defending narrow decisions based on widely-accepted constitutional principles).

[326] *Id.* at 49-50.

[327] *Id.* at 24-45.

[328] For a fuller exposition of my views, see Donald A. Dripps, *Constitutional*

Legislative abdication, however, has left the courts with primary policy-making responsibility with respect to limits on police powers.[329] Professor Amsterdam, and the *Miranda* Court, were quite right to view particular constitutional cases as what they have become—the occasions for making major national policy choices as well as for resolving the claims of the parties.

There are institutional limits on the judicial process, but the Supreme Court can do better than it has done so far.[330] Ideally the Court would take many cases raising related issues for simultaneous resolution, *a' la Miranda*. One of the reasons why the *Miranda* litigation was so exceptional, however, is that the law of confessions had become at that time both highly uncertain and obviously dynamic.[331] Litigants could be counted on to raise a variety of claims, theories, and supporting data.

In the Fourth Amendment context the turn to bright-line rules creates a very different litigation environment. Good lawyers with the choice between a case-specific argument ("the defendant was out of the car, and so not covered by *Belton*") or an across-the-board argument *that has already lost* ("the police should not be allowed to search cars incident to the arrest of suspects who are handcuffed in the squad car at the time of the

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Theory for Criminal Procedure: Dickerson, Miranda, *and the Continuing Quest for Broad-but-Shallow*, 43 WM. & MARY. L. REV. 1, 39-46 (2001).

[329] *See id.* at 45-46; Amsterdam, *supra* note 1, at 378-79 ("Legislatures have not been, are not now, and are not likely to become sensitive to the concern of protecting persons under investigation by the police."). For an excellent example of law-and-order politics, see Frase, *supra* note 258, at 415 ("For example, in Texas, following the *Atwater* decision, a bill limiting arrests in minor cases passed the legislature despite great police opposition, but was then vetoed by the Governor in response to further police pressure.") (footnote omitted).

[330] The Court has long enjoyed the rare prerogative of choosing its own agenda through the discretionary granting or denial of certiorari. For the history (and a critique) of this discretionary jurisdiction, see Edward A. Hartnett, *Questioning Certiorari: Some Reflections on Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643 (2000). For a leading study of the certiorari process in operation, including some evidence of strategic behavior by individual chambers, see H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991).

[331] *See* DRIPPS, *supra* note 3, at 79-81.

search") are not likely to choose the more general. If the Court adheres to the *Thornton* approach and waits for litigants to ask the Court to reconsider the bright-line rules set by precedent, the likelihood is that those rules will go unchallenged and ultimately ossify.

What the Justices might do is specifically ask the litigants to address the continued desirability of bright-line rules in cases that on their face involve only the application of those rules. In *Thornton*, for example, once it became clear that many of the Justices had serious concerns about *Belton* in a post-*Atwater* world, the Court could have ordered reargument on the question of whether the rule announced in *Belton* should be modified or discarded.

What needs to happen procedurally is for *all of the rules* governing the outcome in a particular case to be assessed synthetically. This doesn't mean arguing about every rule in every case; the rules would cease to be rules if that were permitted. The Court, however, should invite the reconsideration of the important rules on a regular basis, especially when significant changes have altered the legal ecology.[332]

An example of the approach I have in mind is *Dickerson v. United States*.[333] The Fourth Circuit held Dickerson's statements admissible under Title II of the 1968 Crime Control statute, which purports to repudiate *Miranda* and reinstate the voluntariness test as the sole standard for judging the admissibility of confessions.[334] In the Supreme Court the government declined to defend the constitutionality of the statute, and ickerson, obviously, agreed with the government.[335] The

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[332] I have previously defended a theory of 'scrupulous stare decisis' in criminal procedure cases, a theory which calls upon Justices to follow both the holding and the rationale of decisions they disagree with, but which calls upon judicial majorities to overrule precedents quite readily when those precedents have lost majority support. *See* Dripps, *supra* note 328. The second part of the theory, encouraging majorities to repudiate disapproved precedents, depends, as a practical matter, on regular opportunities for reassessing rules laid down in prior cases.

[333] 530 U.S. 428 (2000).

[334] *Dickerson*, 530 U.S. at 432.

[335] Neal Devins, *Asking the Right Questions: How the Courts Honored the Separation of Powers by Reconsidering* Miranda, 149 U. PA. L. REV. 251, 255 (2000).

Supreme Court, however, appointed an amicus (then-Professor, now-Judge, Paul Cassell) to argue on behalf of the Fourth Circuit's position.[336]

Here we have an example of the Court reaching out to decide an issue not raised by the parties, despite the importance of that issue in a very large number of other cases. In the Fourth Amendment context, nothing so dramatic is required. If the Court frames the cert grant to include both a narrow question about the application of a bright-line rule *and* a broader question about the continued vitality or scope of the established rule, we can count on defendants and prosecutors to vigorously litigate both questions.

2. Clarity Distinguished from Uniformity: The Case for Testing Alternative Rules

Clarity and uniformity are different things. For example, the statute of limitations for a contract action may well vary from one state to another, but lawyers in each state have no doubt what limitations period applies to claims arising under the law of any given state. In a world of judge-made rules with constitutional force, it would be desirable to have some experience with alternative bright-line rules to inform the federal constitutional inquiry.

To revert to the *Miranda* analogy, the Warren Court didn't just invent the famous warning. The *Miranda* majority instead borrowed the warning from the practice of the FBI, adding only the *Gideon*-inspired offer of appointed counsel to the indigent.[337] The Warren Court had some reason for believing that the warnings wouldn't cripple law enforcement, because the FBI had found the warnings workable. Experience has corroborated the FBI's model; current research indicates that eighty percent of suspects waive their rights.[338]

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[336] For a review of the procedural history, and a cogent defense of the Court's course, see *id.* at 255.

[337] *See* DRIPPS, *supra* note 3, at 82 ("The *Miranda* rules closely resemble the contemporary practice of the FBI.") (footnote omitted).

[338] *Id.* at 224-25 n.117 (reviewing studies).

There is in fact wide variety in the search-and-seizure rules adopted by police departments, state legislatures and state courts. What makes this variety less salient, and thus less instructive, than it might be, is the general reluctance to enforce such subconstitutional rules with the exclusionary sanction.[339] Good reasons exist for this reluctance; legislatures and police departments that have reasons for adopting rules will find ways to enforce them, while judicial imposition of the exclusionary rule for violations of nonconstitutional rules might well deter legislators and police administrators from promulgating such policies.[340]

If we want a body of experience to inform federal constitutional adjudication, then, we must turn to the state courts, the only likely place to develop a track record with the various alternative rules. No doubt the *McKay* court was quite right in reading current law to separate the statutory limit on police arrest decisions from the federal constitution. The California courts, however, have no authority under the state constitution to exclude reliable evidence because it was illegally obtained, except when suppression is required by the federal constitution.

In other states, we should encourage a variety of state constitutional rules, backed by the exclusionary sanction, as experiments in the spirit of Brandeis.[341] These experiments are inevitable with respect to open questions of federal Fourth Amendment doctrine, but they might be most valuable with respect to settled principles of federal law, such as the various components of the iron triangle.[342] What would be the consequences of considering police motivation in search-incident to

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[339] *See, e.g.,* United States v. Caceres, 440 U.S. 741, 757 (1979) (refusing to suppress evidence obtained by IRS agent acting contrary to IRS regulations).

[340] *See* Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 MICH. L. REV. 442, 509 (1990).

[341] *See* David A. Harris, *Addressing Racial Profiling in the States: A Case Study of the "New Federalism" in Constitutional Criminal Procedure,* 3 U. PA. J. CONST. L. 367, 397 (2001) (urging state courts to depart from *Whren* more widely than they have done).

[342] *See* Frase, *supra* note 258, at 412-13 (noting that at least two state courts have rejected *Atwater*).

arrest cases? What would be the consequences of backing statutory limits on misdemeanor arrests with the exclusionary sanction? If my central claim about Fourth Amendment law being more than the sum of the parts is correct, answers to such questions might supply important knowledge about alternatives that might, in due season, be reconsidered by the Supreme Court of the United States.

To state court justices leery of the exclusionary rule, I commend a possibility I have previously defended at some length: the contingent exclusionary rule.[343] Suppressing illegally-obtained evidence unless the government pays damages to the victim, disciplines the offending officer or undertakes institutional reforms calculated to prevent future violations offers many of the advantages, and few of the disadvantages, of the traditional exclusionary rule. Judges reluctant to deviate from the minimum of civil liberty recognized in federal constitutional law might be emboldened to undertake the sort of experiments I have in mind, if they knew that civil liberty might be vindicated without losing the conviction of the present, apparently guilty, defendant.

3. Reconciling Determinacy and Legitimacy: The Need for Systemic Legal Scholarship on Criminal Procedure

The literature on the Fourth Amendment boasts both some of the best law review articles ever written[344] and what is among the most influential legal treatises of modern times.[345] I have the highest respect for each of these forms of scholarship, but there are systemic limits on them both. Journal articles tend either to pour enormous intellectual and research resources into the task of evaluating a particular case or to attacking or defending some overreaching methodology. In between the particular and the general lies the troubling area of intersecting rules I have discussed in this article.

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[343] *See* Donald A. Dripps, *The Case for the Contingent Exclusionary Rule,* 38 AM. CRIM. L. REV. 1 (2001).

[344] *See, e.g.,* Amsterdam, *supra* note 1.

[345] *See* LaFave, *supra* note 31.

Professor LaFave certainly appreciates the interplay of various rules, being both the leading defender of bright-line rules and a vigorous critic of the Court's Iron Triangle. The treatise format, however, has two formal qualities that make it both too close to, and too far away from, the Supreme Court itself. No treatise can get far away from existing positive law, and it is unlikely that a treatise can reflect the challenges of collective decision-making that bedevil the courts.

What might be useful, to both courts and legislatures, is a renewed attempt at a model code of police practices. The Model Code of Pre-Arraignment Procedure[346] arrived both too late and too early. It arrived too late because the Warren Court revolution worked constitutional changes before the drafters had completed their work. It came too early because the project was ended before the steady drift of the Supreme Court in favor of broader police powers had induced something of a reaction among state courts.

The precise body to undertake such a project is not terribly important. What would be important is for *a group* of experts with varying ideological perspectives to undertake the project of regulating police investigations *on a systemic basis*. Much has changed since the ALI project expired; think about terrorism, videotaping, portable telephones, DNA evidence, the psychology of eyewitness identification, and on and on. Any such undertaking would have to grapple with the problems posed by overinclusive rules leveraging one another. That would require compromises of a sort that appear legislative and thus beyond the reach of even open-ended constitutional provisions—until such compromises, like the *Miranda* rules, have become an accepted part of legal culture.

VI. CONCLUSION

Current Fourth Amendment law conditions the use of the primary mode of personal transportation in this country on liability to arbitrary arrest and search. It bears repeating, and

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[346] AM. LAW INST., MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (1975).

it merits emphasis: *That can't be right.* It is a result that defies the Framer's hostility to general searches, that creates incentives for the police to resort to the coercive practice of arrest for the purpose of circumventing limitations on their powers to search, and that contradicts contemporary understandings of reasonableness, as reflected in prevailing practice.

I have tried to trace the roots of this troubling situation to the genuine need for determinacy in Fourth Amendment jurisprudence, rather than to misguided ideologies or mistaken views of historical practice on the part of individual Justices. To some extent the tension between legitimacy and determinacy is irreducible. Clear rules are always wrong in some of their applications. That does not defeat the case for rules, but it does call for recognizing their relationships and considering alternatives, not just on the occasion of particular cases, but from a systemic perspective and on an ongoing basis.

TERRY v. OHIO AT THIRTY-FIVE: A REVISIONIST VIEW

Lewis R. Katz[*]

In its landmark decision, *Terry v. Ohio*,[1] thirty-five years ago, the United States Supreme Court upheld forcible detentions (stops) and searches (frisk) on less than the Fourth Amendment standard of probable cause. The decision came just seven years after *Mapp v. Ohio*[2] where the Supreme Court extended the protection of the Fourth Amendment exclusionary rule to the states and demanded that police obey the law while enforcing it.[3] *Terry* represented a sudden change in direction away from the Warren Court's focus of protecting individual rights from police abuse of power, evidenced in *Mapp* and *Miranda*,[4] to empowering police and expanding police power on the street in *Terry*.[5]

At first glance, the *Terry* doctrine seems to provide police with reasonable authority to investigate suspicious activity and prevent crimes, rather than limiting police only to chasing

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[1] 392 U.S. 1 (1968).

[2] 367 U.S. 643 (1961).

[3] *Mapp*, 367 U.S. at 655 (concluding that because the Fourth Amendment's right to privacy is enforceable against the States through the Due Process Clause of the Fourteenth Amendment, all evidence obtained by searches and seizures in violation of the Fourth Amendment is inadmissible in state court).

[4] Miranda v. Arizona, 384 U.S. 436, 467 (1966) (holding that the Fifth Amendment privilege against self-incrimination includes proper procedural safeguards against police abuse of "the process of in-custody interrogation of persons suspected or accused of crimes").

[5] *See generally* Scott E. Sundby, *An Ode to Probable Cause: A Brief Response to Professors Amar and Slobogin*, 72 ST. JOHN'S L. REV. 1133, 1136-37 (1998) (discussing balancing of individual liberties with police power).

criminals after the commission of a crime. In fact, history has treated the *Terry* doctrine kindly; Professor Steven A. Saltzburg described the decision as a "practically perfect doctrine."[6] *While Terry* has, in fact, provided police with the necessary tools to proactively fight crime, the *Terry* Court dismally failed to strike an adequate balance between effective law enforcement and individual freedom.[7] The Court struck that balance completely in favor of the police, and the balance has been further tipped in favor of police by later Supreme Courts.

Prior to *Mapp v. Ohio*, police were free in most states to act without regard to the limitations imposed by the Fourth Amendment. The burden of that police conduct fell most heavily on people in inner city, minority neighborhoods. At the time of *Mapp*, half the states had not imposed the exclusionary rule as a matter of state law.[8] In states without an exclusionary rule, police were free to detain and search people without reasonable cause because that police conduct had no impact on the outcome of any resulting criminal charges against the subject of the detention and search. Even in states that had adopted the exclusionary rule, citizens were exposed to arguably illegal detentions and searches under

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[6] Stephen A. Saltzburg, Terry v. Ohio*: A Practically Perfect Doctrine*, 72 ST. JOHN'S L. REV. 911, 911 (1998).

[7] *Cf.* Gregory H. Williams, *The Supreme Court and Broken Promises: The Gradual But Continual Erosion of* Terry v. Ohio, 34 HOW. L.J. 567, 576 (1991) (arguing that the Court made the right compromise at the time but *Terry's* subsequent erosion negated the Court's insight).

[8] *See* Francis A. Allen, *The Exclusionary Rule in the American Law of Search and Seizure*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 246 (1961).

> Not all of the American states have adopted the exclusionary rule; indeed, only about half of them have done so. Twenty of the states appear to have adopted the rule without substantial qualification. . . . In Michigan, although the exclusionary rule was adopted early by the courts, certain categories of evidence are now placed outside the operation of the rule by constitutional amendment, including narcotics, firearms and other dangerous weapons seized in places other than a dwelling house. Alabama, Maryland, and South Dakota have by legislation adopted the rule only as to the situations stipulated in their statutes. Hawaii and Alaska have apparently not spoken to the question since becoming states. The federal rule of exclusion operates in the District of Columbia.

Id. at 251-52 (footnotes omitted).

cover of suspicious persons, loitering and vagrancy statutes and ordinances.[9] The movement of the states toward adoption of the exclusionary rule on their own and the imposition of the exclusionary rule on the remaining states in 1963, as well as the contemporaneous challenges to loitering and vagrancy statutes as unconstitutionally vague and overly broad, required police to develop new theories to justify interference on less than probable cause with a citizen's liberty and privacy

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[9] *See* KATHERYN K. RUSSELL, THE COLOR OF CRIME (Niko Pfund ed., 1998). For example, vagrancy laws allowed Blacks to be arrested for the "crime" of being unemployed. Mississippi's statute was representative:

> [A]ll freedmen, free negroes and mulattoes . . . over the age of eighteen years, found on the second Monday in January, 1866, or thereafter with no lawful employment or business, or found unlawfully assembling themselves together. . . shall be deemed vagrants, and on conviction thereof, shall be fined . . . not exceeding fifty dollars . . . and imprisoned . . . not exceeding ten days.

Id. at 19-20 (quoting Jason Gillmer, U.S. v. Clary: *Equal Protection and the Crack Statute*, 45 AM. U. L. REV. 497, 538 (1995) (citing an *Act to Amend the Vagrant Laws of the State*); Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956).

> Administratively, vagrancy-type statutes are regarded as essential criminal preventives, providing a residual police power to facilitate the arrest, investigation and incarceration of suspicious persons. When the District of Columbia vagrancy law was revised ten years ago, Congress was told by police officials ". . . that one of the principal needs to assist in correcting the existing criminal situation in the District of Columbia is the strengthening of the existing vagrancy law." In most jurisdictions these statutes are sufficiently indefinite to give the police wide scope. They permit arrest without warrant and summary prosecution without jury before a justice of the peace or magistrate, and often simplify the problem of proof by placing on the defendant the burden of at least going forward with evidence of innocence. To the extent that one police actually are hampered by the restrictions of the ordinary law of arrest, by the illegality of arrests on mere suspicion alone, and by the defects and loopholes of substantive criminal law, vagrancy-type statutes facilitate the apprehension, investigation or harassment of suspected criminals. When suspects can be arrested for nothing else, it is often possible to "go and vag them.

Id. at 714 (footnotes omitted); *see also* Lawrence Rosenthal, *Gang Loitering and Race*, 91 J. CRIM. L. & CRIMINOLOGY 99, 151 (2000). *See generally* William O. Douglas, *Vagrancy and Arrest on Suspicion,* 70 YALE L.J. 1, 12-14 (1960); Comment, *Is There Something Suspicious About the Constitutionality of Loitering Laws?*, 50 OHIO ST. L.J. 717 (1989).

interests on the street.[10]

A 1959 District of Columbia case, *United States v. Mitchell*,[11] illustrates the issue. While walking his beat, a police officer noticed the defendant attempting to flag a taxi cab at 5:30 in the morning.[12] The man was carrying a pillowcase, and from it an electric cord was dangling onto the ground.[13] The officer approached the defendant and asked him where he was coming from and what his name was.[14] The defendant stated his name and told the officer that he was coming from a party.[15] The defendant also provided identification which corroborated his oral identification.[16] The officer had been walking the beat all night and had not seen or heard evidence of a party.[17] At this point in time, the officer had not observed a crime, nor had he received a report of a crime.[18] However, the officer asked the defendant to accompany him to a police call box roughly a block away.[19] When the defendant (wisely) inquired whether he was under

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[10] *See* Papachristou v. Jacksonville, 405 U.S. 156 (1972).

> This ordinance is void-for-vagueness, both in the case that it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute," and because it encourages arbitrary and erratic arrests and convictions. . . . The poor among us, the minorities, the average householder are not in business and not alerted to the regulatory schemes of vagrancy laws; and we assume they would have no understanding of their meaning and impact if they read them . . . .
>
> Those generally implicated by the imprecise terms of the ordinance – poor people, nonconformists, dissenters, idlers—may be required to comport themselves according to the life style deemed appropriate by the Jacksonville police and the courts.

Papachristou, 405 U.S. at 162-63, 170 (citations omitted); *see also* Chicago v. Morales, 527 U.S. 41 (1999) (invalidating a city ordinance that prohibited "criminal street gang members from loitering with one another or with other persons in any public place" for being impermissibly vague on its face and an arbitrary restriction on personal liberties).

[11] 179 F. Supp. 636 (D.D.C. 1959).

[12] *Mitchell*, 179 F. Supp. at 637.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.*

[19] *Id.*

arrest, the officer replied, "No, you are just being detained."[20] Upon arrival at the call box "the defendant seated himself on the record player contained in the [pillowcase]," and the officer made the call to the police station.[21] The police dispatch informed the officer that no house breakings had been reported.[22] Suddenly, the defendant fled leaving the property behind, and a short time later a report of a house burglary was received by police.[23] One week later, the defendant was apprehended and charged with house breaking and larceny of the record player and records contained in the pillow case that he had left when he bolted.[24]

Mitchell was tried in the District of Columbia where the federal exclusionary rule, adopted in 1914, applied.[25] The defendant moved to suppress the evidence. Counsel for both the government and the state agreed that the mere questioning of the defendant did not constitute an arrest.[26] However, the defense asserted that an arrest occurred when the defendant was asked to accompany the officer to the call box.[27] The district court agreed, suppressed the evidence and held that the defendant had been seized without probable cause when he was required to accompany the officer to the call box.[28] At the time, federal law did not authorize the legal detention of a suspect on less than probable cause.

After *Mapp* dictated the same result as *Mitchell* in all of the states, pressure arose to allow police to make investigatory stops on less than probable cause as they had done for generations in this country. The United States Supreme Court in *Terry* upheld the practice, acknowledging

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[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *See* Weeks v. United States, 232 U.S. 383, 392 (1914) (holding that evidence which is obtained by federal officials as a result of unlawful searches and seizures cannot be used to convict accused persons because it violates the Fourth Amendment).
[26] *Mitchell*, 179 F. Supp. at 636.
[27] *Id.*
[28] *Id.* at 637-38.

that the practice was common and indicating an intent to harness the practice within the reasonableness standard of the Fourth Amendment.[29]

In this Article, I suggest that, while the Warren Court

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[29] *See* David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659, 659-60 (1994).

> For the first time, the Court allowed a criminal search and seizure without probable cause. From *Terry* forward, the question would not be whether there was probable cause, but whether there was reasonable suspicion that criminal activity was afoot. The Court based this change on a balancing of interests. On the one hand, law enforcement called for supple new tools to respond to crime and the dangers its perpetrators posed to officers; on the other, the Court thought the loss of individual liberty was not too great, since *Terry* only allowed a brief stop and a limited, pat-down search of outer clothing to find weapons.

Id. at 659-60 (footnotes omitted); *see also* Brian D. Walsh, *Illinois v. Wardlow: High-Crime Areas, Flight, and the Fourth Amendment*, 54 ARK. L. REV. 879 (2002).

> Before *Terry v. Ohio*, the seizure of an individual required probable cause to arrest. *Terry* was the first case in which the Court was squarely faced with the question of "whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest." *Terry* and its progeny ultimately recognized a narrow exception to the rule requiring an officer to have probable cause for arrest prior to a search or seizure. The limited scope of the search and seizure associated with these brief investigative encounters between law enforcement and suspect, as compared to an arrest, allowed the Court to make such an exception.

Id. at 890-91 (footnotes omitted).

For a discussion of how *Terry* also caused confusion about the meaning of arrest, see Thomas K. Clancy, *What Constitutes an "Arrest" Within the Meaning of the Fourth Amendment?*, 48 VILL. L. REV. 129 (2003).

> The Supreme Court in *Terry* and its progeny brought within the coverage of the Amendment much of what the common law labeled "accostings" and pushed the time of arrest back, requiring a detention exceeding the dimensions of permissible stop. *Terry* significantly departed from the common law's dismissal of some intrusions as accostings by incorporating "stops" within the Amendment but roughly followed the common law, and arguably the Framers' intent, by distinguishing between minor intrusions and arrests. Accepting as a settled principle *Terry's* expansion of the Fourth Amendment to include stops within its coverage and attempting to reconcile the common law and the Framers' intent, at a level of particularity, with those principles, it should be concluded that an arrest is a detention that requires something more than an accosting, that is, something akin to a detention exceeding the bounds of a *Terry* stop.

Id. at 192 (footnotes omitted).

provided a needed tool to police, it failed to achieve its stated purpose of tying the practice to the Fourth Amendment reasonableness standard. First, the Court failed to adequately define an "investigatory stop," leading later courts to harden the definition, eliminating the Fourth Amendment from most on-the-street police-citizen encounters. Second, the facts in *Terry* failed to meet the reasonableness standard Chief Justice Warren purported to apply and which subsequently has been further weakened in later cases. Finally, the decision in *Terry* failed to strike a meaningful Fourth Amendment balance between effective law enforcement and individual freedom.

Part I of this Article closely examines the stop in *Terry* (which the Warren Court did not do). Part II examines the late 1960s which provided the context for the Supreme Court's decision and which influenced that decision. Part III critiques the Supreme Court decision in *Terry* and asks whether the Court was really trying to impose the restraints of the Fourth Amendment on the most common form of police-citizen street interactions or whether the Court was bowing to its fears of what was happening on the streets in urban America in 1968. Part IV discusses how the *Terry* decision opened the door for successor Courts to define "stop" to exclude most on-the-street encounters from the *Terry* definition of stop, thereby eliminating all judicial oversight of such encounters. Part V discusses the *Terry* reasonableness standard which evolved into reasonable suspicion, and how that standard, too, has been watered-down to expose people in urban, minority neighborhoods to intrusive police investigations with virtually no evidence of any intended criminal behavior. This article suggests that terms like "high crime area" or "high drug trafficking area" have become proxies for race. While the *Terry* majority of eight justices may not have anticipated how extensively the later Courts would weaken the protections which the *Terry* Court purported to impose, the Warren Court opened the door for the subsequent restrictions on individual rights by its standardless decision in *Terry*.

PART I: THE FACTS OF THE STOP

The vast power of police to stop and conduct limited searches of citizens on less than probable cause was affirmed in a case originating on the streets of Cleveland, Ohio. The stop in *Terry*, when examined closely, fails the reasonableness standard developed by the Court to uphold the stop and frisk and subsequent arrest of Terry and his two companions. We need to examine carefully the facts leading to that stop, as well as the stop itself, in order to fully understand the implications of the decision.

On Halloween mid-afternoon in 1963, Martin McFadden, a plain clothes Cleveland Police detective, was patrolling his regular beat in downtown Cleveland.[30] He was looking for shoplifters and pickpockets, as he had done for over 35 years.[31] McFadden testified "that he had developed routine habits of observation over the years and that he would 'stand and watch people or walk and watch people at many intervals of the day.'"[32]

Officer McFadden observed two black men, John Terry and Richard Chilton. He testified that when he looked at Terry and Chilton standing on the street, "*they didn't look right to me at the time*,"[33] although he was not acquainted with either man by name or sight, and he had received "[a]bsolutely no information regarding [the] men at all."[34] Officer McFadden did not explain what about the two men "didn't look right" to him.[35] The two men were dressed in topcoats, the standard dress of the day.[36] They were engaged in no unusual behavior when they initially attracted McFadden's attention.[37] When

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[30] Transcript of Chilton's Trial, *reprinted in* State of Ohio v. Richard D. Chilton and State of Ohio v. John W. Terry: *The Suppression Hearing and Trial Transcripts*, 72 ST. JOHN'S L. REV. 1387, app. B at 1449 (John Q. Barrett ed., 1998) [hereinafter Transcript].

[31] *Id.*

[32] *Id.* at 1456.

[33] *Id.* (emphasis added).

[34] *Id.*

[35] *Id.*

[36] *Id.* at 1457.

[37] *Id.* at 1456.

pressed on what about the two men attracted his interest and whether he would pursue them as he did if he saw them that day across from the court house, Officer McFadden replied, "I really don't know."[38]

What happened as McFadden studied Terry and Chilton depends upon which version of Officer McFadden's statement of the facts one reads and in which court opinion the facts appear. McFadden watched the men over a period ten minutes.[39] He watched as one of the two men left the other and walked down the street and looked inside a shop window and continued walking, and then walked back to the other man, again looking in the shop window.[40] The second man then repeated the same behavior.[41] That behavior is the critical conduct which gives rise to the stop in this case. If they did it once or twice each, their behavior was pretty unremarkable. So, how many times they looked in the store window is crucial. In the police report filed the same day as the incident, Officer McFadden wrote that the men did this "about three times each."[42] Between the day of the event when he wrote the police report and his memory was freshest, and the suppression hearing, which was almost one year to the day after the event, Officer McFadden's memory changed. At the suppression hearing three times each became "at least four or five times apiece,"[43] which later turned into four to six trips each.[44] Moreover, at trial, when asked how many trips he observed, Officer McFadden replied, "about four trips, three to four trips, maybe four to five trips, maybe a little more, it might be a little less. *I don't know, I didn't count the trips.*"[45] The Ohio Court of Appeals decision in the case picked up on the uncertainty and asserted that the men separated and

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[38] *Id.* at 1421.

[39] *Id.* at 1457.

[40] *Id.*

[41] *Id.*

[42] Police report from Officer McFadden, to the Cleveland Ohio Police Department (Oct. 31, 1963) (on file with the Cleveland Ohio Police Department) [hereinafter Police Report].

[43] Transcript, *supra* note 30, at 1402.

[44] *Id.* at 1407.

[45] *Id.* at 1457 (emphasis added).

looked in the window "at least two to five times" each.[46] However, by the time the fact worked its way into Chief Justice Warren's majority opinion in the Supreme Court, the number expands exponentially. He wrote that the men did this "between five or six times apiece—in all roughly a dozen trips."[47] Later in the majority opinion, Chief Justice Warren came up with still another number when he described Terry and Chilton's behavior: "where these men pace alternately along an identical route, pausing to stare in the same store window roughly twenty-four times."[48] The body of law which stems from *Terry* is dependent upon this single fact.

Officer McFadden was never sure which store was the subject of the suspects' attention. At the suppression hearing he admitted he had no experience in observing the activities of individuals who were "casing" a store for a robbery.[49] In the police report, Officer McFadden indicated that they were looking in an airline ticket office; at the suppression hearing, the Detective mentioned an airline office or a jewelry store.[50] Chief Justice Warren (wisely) chose not to focus on this issue. If the men were "casing a . . . stickup,"[51] as Officer McFadden believed, a downtown airline office would be unlikely to produce significant cash. Even in 1963, airline tickets were rarely purchased with cash. A jewelry store would be a more lucrative target. Terry and Chilton's street behavior and the supposed target of their interest are extremely important issues because they are all that set apart these suspects from any other two people on the street, unless it was their race.

The third man, Carl Katz, a white man, approached Terry and Chilton in conversation.[52] McFadden did not know the white man either.[53] McFadden suspected that the two black

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[46] State v. Terry, 214 N.E.2d 114, 116 (Ohio Ct. App. 1966), *aff'd*, 392 U.S. 1 (1968).

[47] *Terry*, 392 U.S. at 6 (counting each trip back and forth counting as two observations into the store window).

[48] *Id.* at 23.

[49] Transcript, *supra* note 30, at 1420.

[50] *Id.* at 1457.

[51] *Id.* at 1418.

[52] *Id.* at 1408.

[53] *Id.* at 1458.

men were "casing a job, a stick-up," and he feared they may have a gun.[54] Cleveland was a segregated city, and police lore had it that the only time whites and blacks congregated was to plan or commit a crime. When Terry and Chilton walked on, turning a corner and walking down the street, they stopped in front of Zucker's, a men's clothing store, where they met up again with Katz.[55] At that point, McFadden decided to act.

Officer McFadden walked over to the three men, identified himself as a police officer, and asked for their names.[56] McFadden testified that he received a mumbled response to his inquiry.[57] McFadden then immediately grabbed Terry, spun him around, and "patted down the outside of his clothing.[58] When Officer McFadden felt a pistol in the inside breast pocket of Terry's overcoat, the Supreme Court reported that McFadden, then, reached inside the overcoat to retrieve the pistol but was unable to do so.[59] He ordered all three men into the clothing store where he removed Terry's overcoat and removed a .38-caliber automatic pistol.[60] He then ordered all three men to face the wall, and proceeded to pat-down "the outer clothing of Chilton and the third man, Katz,"[61] finding a .38-caliber revolver in Chilton's pocket, but no weapon on Carl Katz.[62] Warren went on:

> The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz' outer garments.[63]

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[54] *Id.* at 1418, 1466.
[55] *Id.* at 1409.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 1411.
[59] Terry v. Ohio, 392 U.S. 1, 7 (1968).
[60] *Id.*
[61] *Id.*
[62] Transcript, *supra* note 30, at 1465.
[63] *Terry*, 392 U.S. at 7.

All three men were arrested and taken to the police station.[64] Eventually, Terry and Chilton were formally charged with carrying concealed weapons.[65] Katz was held as a "suspicious person" and then released two days later.[66]

Chief Justice Warren's recitation of the facts was essential to the outcome of the case in the Supreme Court and the development of the rules pertaining to stop and frisk. There is a marked contrast between Chief Justice Warren's selective account of the facts of the case derived from some of McFadden's testimony at the suppression hearing and McFadden's initial description of what happened that was contained in the police report. The Detective's initial account reads quite differently:

> At this point I approach these three men and informed them I was a police officer and told them to keep their hands out of their pockets. First one I searched was John Woods Terry age 31 colored of 1275 East 105th St. and in the inside pocket of his topcoat (left side) found a 38 cal. automatic, name on same P. Baretta-cal.9 Corto-M.1934 Brevet- Cardone V.T. 1941 xlx serial NO. 897012. One bullet was in the chamber 6 bullets in the clip.
>
> On searching Richard D[.] Chilton age 32 of 1610 Lotus Dr found a 38 cal revolver loaded with 5 bullets Name Hopkins and Alen Mfg Co Pt. Jan 5 -88 X- L Double action[.] Found this gun in the right hand front pocket of the topcoat Chilton was wearing. Serial NO 5209
>
> Searching Carl Katz white age 49 of 3755 Mayfield Rd found no weapons. Request that these two guns be turned over to Ballistics to be checked out.
>
> Also request that the three above mentioned men be checked out by the Robbery Squad.[67]

The first significant difference is that McFadden ordered the men to keep their hands out of their pockets when he inter-

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[64] Transcript, *supra* note 30, at 1456.

[65] *Id.* at 1518.

[66] *Id.* at 1465.

[67] Police Report, *supra* note 42. Officer McFadden testified, "I ordered the three of them inside the store and told them to keep their–". Transcript, *supra* note 30, at 1412.

cepted them. That fact never made it into the Supreme Court's statement of the facts. The second significant difference is that, in the police report, Officer McFadden said that he "searched" the men, but there is no reference to a pat-down frisk in the police report. However, at the suppression hearing, the detective insisted that he conducted only a pat-down of the suspects' outer clothing before reaching into the pockets of the two who he believed were carrying weapons.[68] The detective also testified that when he ordered the three men into Zucker's men's store where he ordered a clerk to call for the wagon, he patted down the other two men and retrieved a gun from suspect Chilton's outer coat pocket.[69] He testified that he never searched the third man, Katz, because the frisk did not reveal that he possessed a gun.[70]

PART II: HISTORY

Officer McFadden's stop and search was upheld in Ohio courts even though there was no existing legal support for the decision in Ohio law or from the United States Supreme Court. There was ample discussion, however, in other state courts. There was New York case law upholding such searches and seizures on "reasonable suspicion" based upon a New York statute.[71] In California, the state supreme court had upheld a

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[68] *Id.* at 1459-60.

[69] *Id.* at 1461-62.

[70] *Id.* at 1462. Under the Fourth Amendment case law that existed in 1963, the three men were forcibly detained without probable cause. They were arrested and the subsequent search for weapons, whether a full search or a pat down frisk, was illegal. It is only after the Supreme Court decision in *Terry* that investigatory detentions were distinguished from arrests, and limited pat-down searches for weapons were distinguished from searches of the person. *Id.* at 1461-62. Even though such distinctions did not matter in 1963 at the time of the searches in *Terry*, it is very possible that Officer McFadden only conducted a pat-down search of the suspect, Terry. McFadden was acting alone; he had not summoned back-up assistance. A pat-down from behind kept Terry between McFadden and the other two suspects, and a pat-down rather than a search would have been less distracting to McFadden and would have enabled him to keep track of the other two suspects.

[71] N.Y. CODE CRIM. PRO., ch. 86, § 180-a (1964) (current version at N.Y. CRIM. PROC. § 140.50 (McKinney 2004)); *see* People v. Rivera, 201 N.E.2d 32 (N.Y. 1964).

stop and frisk of two men parked in a car on a lover's lane who fled when police approached them.[72] Justice Traynor wrote that "the presence of two men in a parked automobile on a lover's lane at night was reasonable cause for police investigation."[73] The Illinois Supreme Court had also upheld a stop but did not distinguish between probable cause and a lesser standard for the stop.[74]

Citing to "early English practice," the New York statute, and New York and other state court decisions, the Ohio court of appeals said that police have the right to stop and question persons in suspicious circumstances without probable cause to support an arrest.[75] Having upheld the forcible detention, the court said "it follows that the officer ought to be allowed to 'frisk,' under some circumstances at least, to insure that the suspect does not possess a dangerous weapon which would put the safety of the officer in peril."[76]

The United States Supreme Court decision must be understood in the context of its time. When the case was docketed in the United States Supreme Court the country seemed to be coming apart at the seams.[77] Nonviolent resistance to segrega-

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> [T]he evidence needed to make [an] inquiry is not of the same degree or conclusiveness as that required for an arrest.
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> . . . .
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> . . . [T]he incidence of crime in the neighborhood, the peculiar approaches of the defendant and his companion to the grill, the rapid leaving when the police were seen (even in plain clothes three men in a car watching could reasonably give alarm to a person alert to detection), all justified the police stopping the defendant and questioning him.

Rivera, 201 N.E.2d at 34-35.

[72] People v. Martin, 293 P.2d 52, 53 (Cal. 1956).

[73] *Martin*, 293 P.2d at 53.

[74] People v. Faginkrantz, 171 N.E.2d 5 (Ill. 1960)

> The defendant's unlikely explanation of his presence in an alley far from his home at 4:30 A.M., and his inability to produce any indicia of ownership of the car coupled with his admitted criminal record and the history of burglaries in the alley, gave the police reasonable cause to believe that he was committing a crime.

Faginkrantz, 171 N.E.2d at 7.

[75] State v. Terry, 214 N.E.2d 114, 117 (Ohio Ct. App. 1966), *aff'd*, 392 U.S. 1 (1968).

[76] *Terry*, 214 N.E.2d at 120.

[77] *See* David A. Harris, *Addressing Racial Profiling in the States: A Case*

tion and other Jim Crow practices had stalled; black nationalist voices were advocating that white violence should be met in kind.[78] Urban rioting unsettled the country as had massive protests against the Vietnam war. There was a growing white backlash to civil rights advances. That backlash was often violent.

There was also a marked increase in violent crime throughout the sixties and an even greater increase in the fear of crime.[79] In the trial court, the case was *State v. Chilton*, but

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Study of the "New Federalism" in Constitutional Criminal Procedure, 3 U. PA. J. CONST. L. 367, 372-73 (2001).

> Just three months before Terry, the report of the National Advisory Commission on Civil Disorders (often called the Kerner Commission) explained the connection between the urban riots of the 1960's and police conduct towards minorities in unambiguous terms. Hostility between blacks and police was a major factor—indeed, sometimes the precipitating factor—in several of these riots.
>
> Negroes firmly believe that police brutality and harassment occur repeatedly in Negro neighborhoods. This belief is unquestionably one of the major reasons for intense Negro resentment against the police.
>
> The Kerner Commission's report was not the first to make this point. Just a year before, the President's Commission on Law Enforcement and the Administration of Justice had come to a very similar conclusion. . . . The Commission wrote that:
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> . . . .
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> > In case the Justices had somehow missed the unmistakable evidence in these reports and elsewhere that racial injustice at the hands of the police was unavoidably intertwined with the issues in *Terry*, the amicus brief filed by the NAACP Legal Defense and Education Fund made the point in the starkest possible terms. It leaves little doubt that how police treated minorities in street encounters was a matter of grave concern to those combating discrimination against blacks.

Id. at 372-73 (footnotes omitted); *see also*, Adina Schwartz, *"Just Take Away Their Guns": The Hidden Racism of* Terry v. Ohio, 23 FORDHAM URB. L.J. 317 (1996) (discussing the commission reports and other racial factors).

[78] Harris, *supra* note 77, at 371-73.

[79] At the suppression hearing, the assistant county prosecutor stated, "crimes [were] on the increase, crimes of violent nature [were] on the increase, [and] crimes of carrying a gun [were] on the increase." Transcript, *supra* note 30, at 1434. The trial court agreed that "crime . . . has been on the increase." *Id.* at 1445.

In the five years from 1960-1965 there was a 24.4% increase in the violent crime rate in America. Between 1965-1970 the rate jumped to 81.6%. Over the decade there was a 125.9% increase in violent crime rate. Furthermore, between 1960-2001, the years leading up to the *Terry* decision, were the largest annual

by the time the case arrived in the Supreme Court it had become *Terry v. Ohio*. John Chilton, who like Terry was already out of prison on the weapons conviction, was shot and killed while robbing a Columbus, Ohio, drugstore, after shooting and maiming the owner of the drugstore. This seemed to verify Officer McFadden's suspicions five years earlier.[80] Between the time the case was argued in December 1967, and the time the decision was handed down on June 10, 1968, Dr. Martin Luther King had been murdered in Memphis, Tennessee.[81] His death was immediately followed by large-scale rioting in many cities.[82] Senator Robert Kennedy was murdered as he left the Ambassador Hotel in Los Angeles after claiming victory in the California presidential primary just five days before the Court issued its decision in *Terry*.[83]

The Supreme Court stood at the center of much of the backlash to the changes in America during the sixties.[84] The

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increases in the national rate of violent crime. Between 1966-1967 the increase was 15.1% and between 1967-1968 the increase was 17.9%. Bureau of Justice Statistics, *Violent Crime in the United States*, FBI, Uniform Crime Reports, *at* http://www.ojp.usdoj.gov/bjs (last visited May 13, 2004).

[80] Terence Sheridan, Court Upholds Friskings, CLEVELAND PLAIN DEALER, June 11, 1968, at 58.

[81] David A. Harris, Terry *and the Fourth Amendment: Particularized Suspicion, Categorical Judgments: Supreme Court Rhetoric Versus Lower Court Reality under* Terry v. Ohio, 72 ST. JOHN'S L. REV. 975, 979-80 (1998).

[82] Harris, *supra* note 81, at 980.

[83] Jose F. Anderson, *Perspectives on* Missouri v. Jenkins: *Abandoning the Unfinished Business of Public School Desegregation "With All Deliberate Speed"*, 39 HOW. L.J. 693, 716 n.123 (1996).

[84] *See* Yale Kamisar, *The Warren Court (Was it Really So Defense-Minded), The Burger Court (Is It Really So Prosecution-Oriented?), and Police Investigatory Practices, in* THE BURGER COURT (Vincent Blasi ed., 1983).

> The last years of the Warren Court's "criminal procedure 'revolution'" constituted a period of social upheaval, marked by urban riots, violence in the ghettos, and disorders on the campuses. The political assassinations and near-assassinations of the late 1960s, both Congress's and presidential candidate Richard Nixon's strong criticism of the Court, the "obviously retaliatory" provisions of the Crime Control Act of 1968, and the ever-soaring crime statistics and ever-spreading fears of the breakdown of public order "combined to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court's mission in criminal cases."

Id. at 67-68 (footnotes omitted); *see also* Stephen A. Saltzburg, *Foreward: The Flow and Ebb of Constitutional Criminal Procedure in the Warren and Burger Courts*, 69

Court was at the heart of the desegregation battles. The Court also stood at the very center of the due process revolution, trying to make the constitutional guarantee of a fair trial a reality. No decisions of the Warren Court, other than *Brown v. Board of Education*,[85] more rankled southerners and other conservatives, than the Court's 1961 decision, *Mapp v. Ohio* which applied the exclusionary rule to the states, and *Miranda v. Arizona* in 1966, which limited police interrogation practices.[86] After *Mapp*, violations of a defendant's right to be free from illegal arrests and searches were no longer without remedy in states such as Ohio that had refused on its own to apply the exclusionary rule. As a result, *Mapp* ensured that some guilty defendants would go free as tangible evidence of guilt was suppressed. The decisions in *Mapp* and *Miranda* were attacked as coddling criminals, and the criminal justice

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GEO. L.J. 151 (1980).

> Those opposed to the expansion of federal judicial control over police activities saw their displeasure with the Supreme Court increase the longer Earl Warren served as Chief Justice. The criticism came from many quarters, including law enforcement officials. Criminal procedure decisions that appeared to tilt the balance of advantage toward the suspect or the accused were vigorously attacked. Critics charged that the Court had ignored reality by erecting procedural burdens that prevented law enforcement officials from effectively protecting the safety of the community. They claimed that the rights of the public and the victims of crime were receiving little notice from justices intent on fettering police work.

Id. at 152 (footnotes omitted); *see also* Harris, *supra* note 81, at 978.

> As 1968—a presidential election year—began, candidate Richard Nixon made political points by promising that he would restore respect for the law by correcting the mistakes of the Warren Court's liberal jurisprudence. Thus law and order and the struggle of "the peace forces . . . against the criminal forces" became one of the major issues in the presidential campaign in 1968. It was against this backdrop—changes in the legal environment embodied by *Mapp*, violent unrest in cities and on campuses, racial confrontations, and political assassinations—that *Terry* was decided.

Id. at 981 (footnotes omitted).

[85] 347 U.S. 483 (1954).

[86] Justice Walter Schaefer, *Panelists Comments*, 54 KY. L.J. 499, 521 (1966) ("And putting on flesh and blood—coming face-to-face with our ideals and looking them in the teeth—is not always a comfortable process, nor is it always an easy one.").

system and the Supreme Court had become issues in the upcoming 1968 presidential election. "Impeach Earl Warren" signs appeared along highways in most parts of the country.[87]

The case landed in a weary Warren Court little more than a year away from its end. It became clear in *Terry* that the Court was no longer able or willing to try, as it had done in *Mapp* and *Miranda*, to engage in a major reform of the police establishment.[88] The Court, as it had in *Miranda*, could have

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[87] Joseph L. Rauh, Jr., *Historical Perspectives: An Unabashed Liberal Looks At a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 233 (1990).

[88] *See* Francis A. Allen, *The Judicial Quest for Penal Justice: The Warren Court and the Criminal Cases*, 1975 U. ILL. L. FORUM 518 (1975).

> But surely the most fundamental reasons for the Court's loss of impetus lies in the social and political context of the Court in the late 1960's. That period was a time of social upheaval, violence in ghettos, and disorder on campuses. Fears of the breakdown of public order were widespread. Inevitably, the issue of law and order were politically exploited. In the presidential campaign of 1968 the bewildering problems of crime in the United States were represented simply as a war between the "peace forces" and the "criminal forces." The decision in *Miranda* evoked a chorus of criticism of the Court, ranging from the excited to the psychotic. Congress responded with the Omnibus Crime Control and Safe Streets Act of 1968, some provisions of which were obviously retaliatory. These events combined to create an atmosphere that, to say the least, was unfavorable to the continued vitality of the Warren Court's mission in criminal cases.

Id. at 538-39 (footnotes omitted). *But see* Jerold H. Israel, *Criminal Procedure, The Burger Court, and the Legacy of the Warren Court*, 75 MICH. L. REV. 1320 (1977).

> My colleague, Francis Allen, has suggested that the Warren Court had lost its "impetus" for imposing new constitutional standards towards the end of Chief Justice Warren's tenure. He notes in particular the decision in *Terry v. Ohio*, decided during Chief Justice Warren's next-to-last term. *Terry's* significance arguably extends beyond the Court's specific ruling that a frisk justified by less than probable cause is permissible under the [F]ourth [A]mendment. Though its recognition of the practical limitations that undermine the deterrent impact of the exclusionary sanction, Chief Justice Warren's opinion for the Court in *Terry* may have laid the groundwork for future challenges to that sanction by the Burger Court. *Terry* may also be viewed as reflecting new doubts within the Warren Court's liberal majority as to the wisdom of adopting excessive "prophylactic" standards to preserve basic guarantees. Professor Allen suggests that *Terry* and other Court decisions in the late 1960s may indicate that the Court was being forced back into the mainstream of a community consensus primarily concerned with effective law enforcement. Such a shift would have been quite understandable in light of the intense reactions to violent crime and riots during the late 1960s. If the Warren Court had

made the legitimacy of an investigatory detention dependant upon police compliance with a set of prophylactic rules.[89] Of course, the same argument that was made in response to *Miranda* would have surfaced: that creation of a set of tight rules would be legislating and would have exceeded the Court's authority to determine whether a defendant was convicted in accordance with the Constitution.[90]

PART III: THE DECISION

In the majority opinion in Terry, Chief Justice Warren initially framed the controversy presenting the two competing global views on stop and frisk: that "the police should be allowed to 'stop' a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity,"[91] versus "that there is not—and cannot be—a variety of

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indeed started such a shift, then the Burger Court might be viewed in a quite different light when compared with its predecessor.

The civil libertarian may justifiably argue, however, that the decisions of the late 1960s did not reflect any overall change in the posture of the Warren Court. While *Terry* may be viewed as an illustration of the Warren Court's eventual retreat from its earlier "expansionist phase," it also may be viewed as just another example of the Warren Court's special difficulties in dealing with [F]ourth [A]mendment issues.

Id. at 1346-47 (footnotes omitted).

[89] *Cf.* Allen, *supra* note 88.

These rules avoid or lessen the occasions that require consideration of the "totality of the circumstances" presented by the record and the concomitant determination whether, on balance, the defendant received a fair trial in the particular case. The principal advantages of per se rules to a Court embracing broad supervision of criminal justice function were thought to be two. First, such rules give relatively certain guidance to the lower courts, and thus avoid the confusions and uncertainties associated with precedents that weigh a multitude of factors, some of which may be unique to the particular case at hand. Second, such rules are applicable to a great mass of cases at the trial court levels without direct involvement of the Supreme Court, thereby minimizing the consequences of the Court's lack of time and resources to adjudicate than the smallest fraction of criminal cases presenting constitutional issues.

Id. at 532 (footnotes omitted).

[90] *See generally* Mark A. Godsey, *When* Terry *Met* Miranda*: Two Constitutional Doctrines Collide*, 63 FORDHAM L. REV. 715 (1994) (providing a detailed analysis of *Terry* and *Miranda*).

[91] *Terry*, 392 U.S. at 10.

police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest."[92]

He then digressed and explained how the effectiveness of the exclusionary rule is limited where, presumably as in this case, "obtaining convictions is [not] an important objective of the police."[93] Rather, he pointed out how the exclusionary rule "is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal."[94] The Court addressed the issue of the day and said that "[t]he wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial."[95]

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[92] *Id.* at 11.

[93] *Id.* at 14. *See generally* Monrad G. Paulsen, *The Exclusionary Rule and Misconduct by the Police*, 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 255, 255 (1961) ("Police officers are not controlled more rigorously by the exclusionary evidence rule than they are by force of their own respect for the law. If police obey the rules set by the community to govern police practice, they obviously will not obtain evidence illegally. The point is often missed."). *See also* Frank J. McGarr, *The Exclusionary Rule: An Ill Conceived and Ineffective Remedy* 52 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 266 (1961).

> I cannot accept the proposition that turning criminals loose on society by suppressing illegally seized evidence does adequately solve the problem of punishing the over zealous and misbehaving officer. It punishes, in fact, the innocent citizenry. The officer is not disciplined for the failure to obtain a conviction. The officer is not disciplined in our modern society for his illegal search. The federal exclusionary rule in effect now for nearly fifty years has not noticeably deterred illegal searches and seizures which, if the civil liberties groups are to be believed, are as pressing a problem today as they ever were.

Id. at 267-68; *see also* Anthony G. Amsterdam, *The Supreme Court and The Rights of Suspects in Criminal Cases*, 45 N.Y.U. L. REV. 785 (1970).

> But if the Court strikes down a police practice, announces a "right" of a criminal suspect in his dealings with the police, God only knows what the result will be. Out there in the formless void, some adjustment will undoubtedly be made to accommodate the new "right," but what the product of this whole exercise will be remains unfathomable. So, again, the Court is effectively disarmed.

Id. at 791.

[94] *Terry*, 392 U.S. at 14.

[95] *Id.* at 14-15; *see* Harris, *supra* note 77

Not only did this statement signal that the Court was backing down from the leadership role it had assumed in *Mapp* and *Miranda*, it amounted to an amazing admission of powerlessness from a Court that purported to care about the issue. That admission was a prelude to sanctioning a tool that would exponentially ratify increased police power on the street, a tool which would be very susceptible to abuse and arbitrary and discriminatory police conduct. Then the Court applied the standard it had set for measuring the reasonableness of the exercise of that tool to the facts of the case in such a way to signal that the reasonableness standard would only operate as a brake upon the most egregious exercises of police power. The standard adopted and applied in *Terry* had the effect of a stamp of approval on such police behavior.

The Court seemed resigned to its powerlessness: that no matter how it ruled in *Terry*, it would have little impact on the streets because no matter the rule, police would not obey it. Thus, the Court elected not to marshal whatever was left of its moral strength to demand that police obey the law while enforcing it.[96] By the time *Terry* came before the Warren Court,

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These words may appear a bit puzzling. The Court appeared to give credence to the idea that aggressive police practices like stops and frisks impact blacks and other minorities disproportionately. At the same time, it says that it will not require the use of the exclusionary rule in these situations, since excluding evidence cannot affect police conduct not targeted at securing evidence. Understandably, commentators have drawn different implications from these seemingly opposed strands of argument. Nevertheless, the effect of racial discrimination by law enforcement did indeed make up an important part of what the Supreme Court hoped to accomplish. By acknowledging the racial implications of the police practices it decided to allow and regulate, it brought the issue within the realm of proper consideration in constitutional criminal procedure. *Terry* represents a clear signal that the racial aspects of police procedure did indeed make a difference, and could be addressed in discussion of the constitutional regulation of police procedure.

Id. at 374 (footnotes omitted).

[96] *See* Allen, *supra* note 88.

Admittedly, local police forces are expected to be accountable to the agencies of local government that create and maintain them. In reality, however, one of the striking characteristics of American police agencies, both at the state and federal level, is the degree to which they have succeeded at eluding genuine accountability to civil authority. Indeed, the upper

it apparently lacked the strength and courage it once had to try to reshape America.

The Court then turned to the issues of the case, focusing predominantly upon the frisk, which the Court saw as "[t]he crux of the case."[97]

> We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity—issues which have never before been squarely presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to "stop and frisk"—as it is sometimes euphemistically termed—suspicious persons.[98]

However, this analysis virtually ignored the critical threshold question of when the stop occurred, a question which Chief Justice Warren admitted was a trigger issue of controversy in the country.[99] For *Terry* to provide meaningful guidance, the Court needed to expand on this "trigger issue," which the Court candidly acknowledged was its first task.[100] The Fourth Amendment protection of reasonableness would not apply until there was a seizure within the meaning of the amendment. As Chief Justice Warren pointed out, prior to a seizure, a police officer, like any other citizen, is free to talk to people on the street without implicating the Fourth Amendment.[101] The

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> levels of the police hierarchy itself are often unable to maintain effective supervision over the lower levels.

Id. at 524.

[97] *Terry*, 392 U.S. at 23.

[98] *Id.* at 9-10.

[99] *Id.* at 16.

[100] *Id.*

[101] *Id.* at 13.

> Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide

Court failed to note, nor has ever later acknowledged, that a police officer's request for information carries with it a certain compulsion that does not accompany one citizen's request for information from another.

A. The Stop

The Court admitted that the stop could have occurred either when McFadden approached the men or when McFadden spun Terry around. However, the Court was clearly ambivalent as to when the stop occurred and thus never conclusively stated when Terry was seized.

> Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a "seizure" has occurred. We cannot tell with any certainty upon this record whether any such "seizure" took place here prior to Officer McFadden's initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionality protected rights had occurred.[102]

Chief Justice Warren wrote that "McFadden 'seized' petitioner and subjected him to a 'search' when he took hold of him and patted down the outer surfaces of his clothing."[103] The Court settled on the moment when Officer McFadden, receiving no assuring response to his question, spun Terry around to use him as a buffer between himself and the other two suspects and frisked Terry's outer clothing.[104] Choosing that precise moment insulated the state from Fourth Amendment scrutiny earlier in the encounter, delaying when the state had to establish reasonable cause for the seizure and the frisk. It also raised a question as to whether the Court's assessment of reasonableness was not at least partially based upon McFadden's description of Terry's mumbled response to McFadden's inqui-

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> variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime.

Id.

[102] *Id.* at 19 n.16.

[103] *Id.* at 19.

[104] *Id.* at 19 n.16.

ry.[105] Of course, the view that the three men were not seized until Officer McFadden laid hands on Terry and spun him around is dependent upon concluding that reasonable persons in Terry, Chilton and Katz's position would not have felt compelled to remain on the scene and respond to McFadden even before the moment that Terry was grabbed, but, instead, could have refused to cooperate and walked away.[106] Only an ostrich could reach that conclusion. It requires ignoring, which the Court did, McFadden's order to the three men to keep their hands out of their pockets, and it requires ignoring the power and implicit threat of violence that police posed when dealing with black men on the street in 1968. If the Court truly could not tell precisely when the seizure took place, that uncertainty demonstrates a complete lack of understanding of the relationship on the street between police and citizens, especially between police and black citizens. It is an understanding that the present Court totally lacks, but we had expected better of the *Warren* Court.

On the other hand, there is also language in Chief Justice Warren's opinion and in the separate concurring opinions of Justices White and Harlan that signals a belief that when Officer McFadden confronted Terry, Chilton and Katz, he seized the three men within the meaning of the Fourth Amendment.[107] This should have been an obvious conclusion. When

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[105] *See id.* at 34 (White, J., concurring).

> Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.

Id. (White, J., concurring); *see also* Hiibel v. Nevada, 124 S. Ct. 2451, 2458 (2004) (holding that a Nevada "stop and identify" statute that requires a suspect to disclose his name in the course of a valid *Terry* stop does not violate the Fourth Amendment).

[106] *See* United States v. Mendenhall, 446 U.S. 544, 554 (1980) (holding that a Fourth Amendment seizure from police questioning occurs only where a reasonable person would feel compelled to stay).

[107] *See, e.g., Terry*, 392 U.S. at 30.

Officer McFadden confronted the three men, identified himself as a police officer, and ordered them to keep their hands out of their pockets,[108] they were hardly free to disregard the officer's questions and walk away.

There is no easy explanation for the Court's ambivalence about when the seizure took place. It is difficult to explain because the Court was not very precise and the encounter escalated very quickly: "When the men 'mumbled something' in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around . . . and patted down the outside of his clothing."[109] There were just few seconds between the initiation of the encounter and the laying on of hands to allow for much consideration as to when exactly the three men were seized. Nothing of substance changed between the time McFadden accosted the three and when he laid hands on Terry.

The Court held that based on the facts, Officer McFadden had reasonable suspicion from the outset, and therefore, the timing of the stop was not outcome determinative.[110] Eight Justices appeared to believe that "specific and articulable facts

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> We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Id.; *id.* at 33 (Harlan, J., concurring) ("His justifiable suspicion afforded a proper constitutional basis for accosting Terry, restraining his liberty of movement briefly, and addressing questions to him, and Officer McFadden did so.").

> There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. However, given the proper circumstances, such as those in this case, it seems to me the person may be briefly detained against his will while pertinent questions are directed to him.

Id. at 34 (White, J., concurring).

[108] Police Report, *supra* note 42.

[109] *Terry*, 392 U.S. at 7.

[110] *Id.* at 28, 30.

which, taken together with rational inferences from those facts, reasonably warrant[ed]" an intrusion at that moment.[111] However, the failure to determine when the stop occurred had major repercussions for subsequent decisions over the next four decades.[112] Chief Justice Warren's lack of insight into the rip-

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[111] *Id.* at 21.

[112] *See* Harris, *supra* note 81,

> Unfortunately, *Terry* and its companion cases do not deal directly with the issue of what constitutes sufficient grounds for a stop. In *Terry,* the Court said that the central issue was not the propriety of the stop but the frisk, and all but refused to discuss the stop; in *Sibron v. New York*, the Court proceeded directly to a discussion of the frisk without any consideration of the seizure of the defendant and his removal from the place where the officer found him. Despite Justice Harlan's prodding, the Court did nothing more in *Terry* and *Sibron* to define what it would accept as the legal basis for a stop, an issue "on which courts, lawyers and police deserve guidance." Thus the task was left to subsequent decisions.

Id. at 988-89 (footnotes omitted); *see also* Tracey Maclin, *The Decline of the Right of Locomotion: The Fourth Amendment on the Streets,* 75 CORNELL L. REV. 1258 (1990).

> In *Terry*, the government argued that police conduct that detains a person, but falls short of a traditional arrest, is not a "seizure" within the meaning of the [F]ourth [A]mendment. The *Terry* Court "emphatically reject[ed] this notion." It explained that "whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." Although the Court stressed this definition of "seizure," it did not clearly apply its definition to the facts at hand. The Court claimed that it could not determine whether any seizure occurred before Officer McFadden physically contacted Terry. Consequently, it assumed that before McFadden frisked Terry, "no intrusion upon constitutionally protected rights had occurred."
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> The Court's uncertainty seems strained. If, as the Court stated, a seizure occurs whenever an officer accosts a citizen and restrains his or her freedom, than Terry and his companions were seized prior to the frisk . . . . Under either of the Court's definitions of "seizure," it seems clear that Terry was seized before Officer McFadden grabbed him. Justice Harlan thought so. He explained that the officer's observations justified accosting Terry and "restraining his liberty of movement." Indeed, only the most defiant citizen would feel free to leave a police officer under such conditions. Nevertheless, the *Terry* majority assumed that no intrusion had occurred that implicated the [F]ourth [A]mendment. Had the Court directly confronted the facts, it would have been forced to acknowledge that accosting a person on the street restrains liberty and demands fourth amendment scrutiny.

Id. at 1297-98 (footnotes omitted); *see also* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of* Camara *and* Terry, 72 MINN. L. REV.

ple effects of this factual determination paved the way for the later Supreme Court to hold that Fourth Amendment seizures occur far later in a police-citizen encounter, thus delaying citizens' Fourth Amendment protections and shielding police from the amendment's limitations. The result is unfettered discretionary power which has resulted in an erosion of civil liberties and an arguably unrestrained sanctioning of police powers.[113]

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383 (1988).

> The Court's apparent failure to recognize the potential import of its holdings in *Camara* and *Terry* heightened the impact of their conceptual changes in [F]ourth [A]mendment interpretation. Both cases significantly altered the traditional relationship between the [R]easonableness and [W]arrant [C]lauses, and yet the Court did not address their implications beyond the relatively discrete areas of housing inspections and stops and frisks. That several of the Justices who have protested most vocally to expanding the reasonableness balancing test concurred in *Terry* and *Camara*—the cases which made the expansion possible—best evidences the Court's failure to appreciate the implications of the changes at the time they were made. The Court had unloosed reasonableness but seemed uncertain about where the new doctrine was going or how to constrain it. What was certain, however, was that each subsequent case would add to the controversy over the proper realm of probable cause and the reasonableness balancing test, further fracturing fourth amendment analysis.

Id. at 404-06 (footnotes omitted); *cf.* Kamisar, *supra* note 84.

> The Warren Court's opinions in the stop and frisk cases leave much to be desired. The [J]ustices "detoured around" the threshold issue of investigative "stops," one on which the lower courts, lawyers, and police deserved guidance, and discussed only the "frisk" issue; strained a good deal to avoid explaining how the police, after removing an *opaque* envelop [sic] from a "frisked" suspect's pocket, could open the envelope to see what was inside; seemed to misunderstand "classical 'stop and frisk' theory"; confused the limited search permitted to uncover weapons that may be used to assault police with the more extensive search permitted when an arrestee is about to be transported to the police station; and seemed to assume that a less restrictive Fourth Amendment test applies when the police act *without* a search warrant (although the Court had repeatedly held to the contrary).
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> . . .
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> But the stop and frisk cases left such a spongy standard, one that allowed police so much discretion and provided the courts so little basis for meaningful review . . . that these Warren Court decisions must have been cause for celebration in more than a few precinct stations throughout the land.

Id. at 65.

[113] *Cf.* Rachel Karen Laser, *Unreasonable Suspicion: Relying on Refusals to*

In the end, the majority eschewed a general principle and simply stated, "we can only judge the facts of the case before us."[114] In fact, the Court stated that anything more might hinder crime prevention.

> Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime.[115]

The Court's dismissal of the exclusionary rule mirrors some of the harshest criticism leveled against the Court after 1961: that its decision in *Mapp* would hinder effective law enforcement.[116]

Support Terry *Stops*, 62 U. CHI. L. REV. 1161, 1169 (1995) ("As the Court articulated in *United States v. Cortez*, the Terry standard is not self-evident in practice: 'Terms like "articulable reasons" and "founded suspicion" are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise.'") (footnotes omitted).

[114] *Terry*, 392 U.S. at 15. "Doubtless some 'field interrogation[s]' conduct violates the Fourth Amendment." *Id.* at 13-14.

[115] *Id.* at 15.

[116] *See* Arlen Specter, Mapp v. Ohio*: Pandora's Problems for the Prosecutor*, 111 U. PA. L. REV. 4, 40-43, (1962) ("Some of the resentment to *Mapp* arises from the manner in which the exclusionary rule was imposed upon the states. The objection is frequently raised that a sudden change on such a fundamental evidentiary question is properly a legislative, rather than a judicial function."); *see also* Fred E. Inbau, *Public Safety v. Individual Civil Liberties: The Prosecutor's Stand*, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 85 (1962).

> Some eminent jurists of the past, including Justice Benjamin Cardozo, at the time when he sat on the New York Court of Appeals, were opposed to the exclusionary rule. In his celebrated opinion in *People v. Defore* Justice Cardozo gave some clear cut, sensible reasons why New York chose not to follow the exclusionary rule. He adhered to the view that relevant evidence should not be brushed aside and ignored solely because of the methods the police used to obtain it. The great scholar, Dean John Henry Wigmore, was opposed to the rule, and in his monumental treatise on Evidence he pointed out the historically unfounded judicial reasoning that was used in the first federal case to adopt the exclusionary rule.
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> . . . .
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> After all these years of a general recognition of the exclusionary rule as a rule of evidence only, and after it was for so long proclaimed to be such by the Supreme Court itself, the Court in *Mapp v. Ohio* suddenly labels the rule to be a requirement of due process. Of little comfort is the fact that three of the nine [J]ustices (Frankfurter, Harlan, and Whittaker) adhered to the former viewpoint.

The Court seemed to surrender to that criticism in *Terry*. The criticism is incomplete and unfair because it purports to examine the cost of applying the constitutional protection without ever considering the costs of not applying the constitutional protection.

Forty years later, no reasonable person could suggest that it was improper for Officer McFadden to take some action. However, the Court's conclusion that a strict application of the exclusionary rule may hinder crime prevention was based on the erroneous assumption that McFadden's only option was to seize the men. He could have scrutinized their behavior by continuing to follow them. He even could have let them know without confronting them that he was a police officer. What would have been the effect of such different behavior? If the three men were contemplating a robbery, as Officer McFadden

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> Why this change in the Court's attitude? The answer, in my opinion, is very simple. It's just another example of the Court's continuing efforts to police the police—and that is an executive, or at most a legislative function of government. It certainly is not the constitutional function of the judiciary.

Id. at 88-87 (footnotes omitted). *But see* Yale Kamisar, *Public Safety v. Individual Liberties: Some "Facts" and "Theories"*, 53 J. CRIM. CRIMINOLOGY & POLICE SCI. 171 (1962) (criticizing Inbau's arguments against *Mapp v. Ohio*). For further criticism of the arguments against *Mapp*, see Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution,* 152 U. PA. L. REV. 1361 (2004).

> After *Brown* gave blacks equality in education, it was only a matter of time before the Supreme Court would turn to racial equality in other contexts, such as criminal procedure. Indeed, as the civil rights movement gained momentum, the notion that blacks should be protected in their civil rights, but not when their liberty and lives were at stake, must have seemed patently absurd.
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> Thus, for several reasons, 1961 presented a much more favorable climate to launch a criminal procedure revolution, starting with restraints on police power, than had earlier years . . . . Moreover, by 1961, the nation as a whole was less tolerant of local law enforcement abuses and more receptive to the notion of federal intervention in traditional state affairs. The Supreme Court's decision in *Mapp* reflects these developments. In *Mapp*, the Court took power from the states at a time when the states could not be trusted and protected blacks at a time when the nation was awakening to the need to protect them. As such, the common conception of *Mapp* as an aggressively countermajoritarian decision is simply inaccurate.

Id. at 1389 (footnotes omitted).

believed, they would have dropped the plan once they were aware that he suspected them. No robbery would have been committed on that street at that time, and the suspected crime would have been prevented in a far less invasive way. Naturally, such a suggestion opens the door to the criticism that anything less than a seizure, a search and ultimately an arrest would have left the guns found on Terry and Chilton's persons on the street and would have left the men free to commit a robbery on another street at another time. Such criticism, however, assumes that the men were "casing a robbery," and there was never any additional evidence that robbery was their purpose.

B. Reasonableness of the Stop

After the Court glossed over the issue of when the stop occurred, they moved onto the reasonableness of the stop.[117] First, the Court affirmed that terms such as "stop" and "frisk" are not outside the Fourth Amendment.[118] Second, these non-traditional seizures and searches are to be "tested by the Fourth Amendment's general proscription against unreasonable searches and seizures," rather than the probable cause standard applicable to arrests and traditional searches.[119] Third, the reasonableness of the intrusion will be determined "by balancing the need to search [or seize] against the invasion which the search [or seizure] entails."[120] Fourth, "in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[121] "Anything less would invite intrusions . . . based on nothing more substantial than inarticulate hunches[.]"[122] Fifth, the intrusion must be subject "to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness

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[117] *Terry*, 392 U.S. at 20.
[118] *Id.* at 19.
[119] *Id.* at 20.
[120] *Id.* at 21 (quoting Camara v. Municipal Court, 387 U.S. 523, 537 (1967)).
[121] *Id.* at 21.
[122] *Id.* at 22.

of a particular search or seizure in light of the particular circumstances" and be subjected to "an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?"[123]

Then the Court applied these principles to the Terry stop. The Court stated that "effective crime prevention and detection" justifies a police officer "in appropriate circumstances and in an appropriate manner approach[ing] a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest."[124]

> It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly [twenty-four] times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of [thirty] years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.[125]

And with that pronouncement, the Court moved beyond the

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[123] *Id.* at 21-22.
[124] *Id.* at 22.
[125] *Id.* at 22-23.

stop to the frisk which it considered the most important issue.

It is useful again to look closely at the facts that the Court found sufficient to find the investigatory seizure reasonable.[126] That task is necessary to determine whether the decision was based upon "articulable facts and circumstances"[127] or an "inarticulate hunch"[128] and must be used as guidance to measure different fact situations following *Terry*.

First, Officer McFadden was not readily forthcoming about why Terry and Chilton initially aroused his curiosity on that crowded downtown street. For some reason, he was watching the two men from the outset even though he did not know them or anything about them.[129] Of course, watching people on the street does not interfere with Fourth Amendment rights and need not be justified. The only facts that Officer McFadden could articulate to support the seizure were the trips two of the suspects, Terry and Chilton, made to look in a store window and then return to confer with the other and with Katz.[130]

Second, the Court played fast and loose with the most important fact in the case: the number of trips Terry and Chilton made up the street and how many times they looked into the store window. Warren reported that the two men looked into the window twenty-four times.[131] That figure is reported with a certainty that the evidence does not support. McFadden was confused about how many times this occurred; a fair reading of the many times he stated what happened leads to the conclusion that they looked into the window between four and twenty-four times. His police report written immediately after the arrests stated that each man made three trips.[132] This fact is critical because it is unclear as to whether the seizure would have been reasonable based on fewer observations of the store window.

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[126] *Id.* at 32-33 (Harlan, J., concurring). Note that the *Terry* majority never used the term reasonable suspicion.

[127] *Id.* at 21.

[128] *Id.* at 22.

[129] *Id.* at 5.

[130] *Id.* at 6.

[131] *Id.* at 23.

[132] Police Report, *supra* note 42.

Third, Officer McFadden could not identify which store the men were looking into. Initially, he thought they were looking into an airline office which would not have had a large amount of cash on hand or merchandise that might have attracted them. He singled out the airline office in the police report. At the suppression hearing, a year later, Officer McFadden testified that he thought a jewelry store was the target.

Fourth, by the time Officer McFadden confronted the three men, they had apparently given up on whichever store had been the target of their repeated trips and interest. At that time the two men were conducting themselves "[l]ike anybody else."[133] They walked for three minutes in that fashion beyond the two stores, turned the corner and were walking down a different street.[134] After walking that distance, they stopped in front of a men's clothing store, where Officer McFadden had moved, where they were joined by the third man, and the three talked for a minute or two.[135] Officer McFadden then accosted the three men, identified himself as a police officer, ordered them to keep their hands out of their pockets and asked their names.[136]

Finally, and of lesser significance, the men did identify themselves when asked to by McFadden, even though Chief Justice Warren characterized their response as a single mumbled response.[137] McFadden testified that each man "gave [his name] to me quick." [138]In the same direct examination, Officer McFadden said, "They said something;"[139] on cross-examination in response to the prosecutor's question, Officer McFadden said, "they mumbled something."[140]

The facts of the case, on which this major change in the law rests, are ludicrous upon close examination. Chief Justice Warren set up the test: whether the seizure was based on an

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[133] Transcript, *supra* note 30, at 1402.
[134] *Id.* at 1403.
[135] *Id.*
[136] *Id.* at 1403-04.
[137] *Terry*, 392 U.S. at 7.
[138] Transcript, *supra* note 30, at 1403.
[139] *Id.* at 1404.
[140] *Id.* at 1409.

"inarticulate hunch"[141] rather than upon "articulable facts and circumstances"[142] giving rise to a reasonable belief that a crime was imminent. The limited information on which Officer McFadden acted clearly points to his acting on a hunch which might have warranted his continuing interest in them but certainly not a lawful seizure based upon such paltry and contradictory information. Nonetheless, Chief Justice Warren concluded that Officer McFadden's seizure and search of the men were reasonable.

> He had observed Terry, together with Chilton and another man, acting in a manner he took to be preface to a "stick-up." We think on the facts and circumstances Officer McFadden detailed before the trial judge a reasonably prudent man would have been warranted in believing petitioner was armed and thus presented a threat to the officer's safety while he was investigating his suspicious behavior. The actions of Terry and Chilton were consistent with McFadden's hypothesis that these men were contemplating a daylight robbery—which, it is reasonable to assume, would be likely to involve the use of weapons—and nothing in their conduct from the time he first noticed them until the time he confronted them and identified himself as a police officer gave him sufficient reason to negate that hypothesis. Although the trio had departed the original scene, there was nothing to indicate abandonment of an intent to commit a robbery at some point. Thus, when Officer McFadden approached the three men gathered before the display window at Zucker's store he had observed enough to make it quite reasonable to fear that they were armed; and nothing in their response to his hailing them, identifying himself as a police officer, and asking their names served to dispel that reasonable belief. We cannot say his decision at that point to seize Terry and pat his clothing for weapons was the product of a volatile or inventive imagination, or was undertaken simply as an act of harassment; the record evidences the tempered act of a policeman who in the course of an investigation had to make a quick decision as to how to protect himself and others from

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[141] *Terry*, 392 U.S. at 22.
[142] *Id.* at 21.

possible danger, and took limited steps to do so.[143]

If it had not been for Justice Harlan filling in the gaps, the *Terry* decision might have stood for allowing police to search (frisk) any time a police officer becomes concerned that a person is armed, regardless of whether there was reasonable cause to forcibly detain a suspect. Justice Harlan clarified that "the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime."[144] The facts in *Terry* justifying the forcible detention are so weak that they should raise eyebrows even in those courtrooms where judges are unusually inclined to favor the police.

What the Court, in fact, did was uphold a seizure on less than probable cause based on little more than race. In so doing, the Court virtually obliterated the Fourth Amendment protections which it had imposed on the states, at least for inner city young black men, exposing them, without legal protection, to the same police harassment that black men had historically faced in their dealings with police dating to the time of slavery.[145] Incredibly, this was a Court sympathetic to

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[143] *Id.* at 28.

[144] *Id.* at 33 (Harlan, J., concurring). While Justice Harlan would have made the right to frisk automatically flow from the right to stop, subsequent law has made them separate inquiries. *Id.*

[145] *See* RUSSELL, *supra* note 9.

> From 1619 to 1865, slave codes embodied the criminal law and procedure applied against enslaved Africans. The codes, which regulated slave life from cradle to grave, were virtually uniform across states—each with the overriding goal of upholding chattel slavery. The codes not only enumerated the applicable law but also prescribed the social boundaries for slaves—where they could go, what types of activity they could engage in, and what type of contracts they could enter into.
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> . . . As indicated, slaves faced death for numerous criminal offenses. Harsh sanctions, such as brutal public executions, were imposed to keep slaves in their place. Under Maryland law, for example, a slave convicted of murder was to be hanged, beheaded, then drawn and quartered. Following this, the head and body parts were to be publicly displayed.
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> Slaves lived with the constant fear that at any moment they might be charged and convicted of crimes they did not commit. They also lived with the knowledge that if they were the victims of crime, there was no avenue for redress.

Id. at 14-16 (footnotes omitted).

this problem, but the decision in *Terry*, instead, revealed a Court that was sympathetic to maintaining control over the black population. Rather than strike a balance between legitimate societal needs and individual rights as the Court claimed it was doing, the Court struck the balance totally in favor of the police.[146]

It is too late in the day to question the validity and reasonableness of investigatory stops on less than probable cause.[147] Common sense dictates that police must have reasonable power to forcibly engage people before a crime is committed rather than limiting police power to chasing criminals after the crime is completed. However, the greatest harm in Terry is that it ratified a stop *without defining "stop" and did so on such weak facts*. Chief Justice Warren acknowledged the problem: the need to prevent crime without losing control of the police who may use these powers unfairly to harass black and Latino kids on the streets.[148] But the Terry outcome focused only on the crime prevention issue and ignored the problems associated with the exercise of the enormous power the Court in *Terry*

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[146] *Terry*, 392 U.S. at 39 (Douglas, J., dissenting) (arguing that the Court succumbed to "hydraulic pressures . . . that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand."). *Cf.* Jose F. Anderson, *Accountability Solutions in the Consent Search and Seizure Wasteland*, 79 NEB. L. REV. 711 (2000).

> The Warren Court's attempts to secure rights for the accused through well intentioned opinions often resulted in opinions that were difficult to justify under traditional scholarly analysis and that were often crafted in a way that subjected them to attack. Nevertheless, the shortcomings advanced by the critics regarding the Court's approach to constitutional decision-making should also recognize that the goal of government accountability in criminal prosecutions is the primary focus of a large portion of the Bill of Rights. They should also take into account the fact that our country has a history of largely ignoring the rights of the poor, oppressed, and those in the minority, even after express language was written in the Constitution to protect them.

Id. at 747-48 (footnotes omitted).

[147] In the interest of full disclosure, I was an author of the amicus brief in *Terry* submitted by the American Civil Liberties Union in which we argued that the Fourth Amendment should not allow seizures of the person on less than probable cause. *See generally* Brief of Amicus Curiae American Civil Liberties Union of Ohio, Terry v. Ohio, 293 U.S. 1 (1968) (No. 67).

[148] *Terry*, 392 U.S. at 14-15.

bestowed on the police. Thirty-seven years later those issues have grown even more serious.[149] In the end, *Terry* is the genesis for later Justices, less inclined to limit police power, who (1) narrowed the definition of "stop," placing most citizen-police encounters beyond the oversight of the Fourth Amendment, and (2) even further watered-down the reasonable cause standard which was not strong to begin with in *Terry*.[150]

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[149] *See generally* William M. Carter, *A Thirteenth Amendment Framework for Combating Racial Profiling*, 39 HARV. C.R.-C.L. L. REV. 17 (2004) (arguing that the practice of racial profiling engenders more than just individuals' subjectively discriminatory views, but rather derives from the historical stigmatization of African Americans as predisposed to criminality, dating back to the era of slavery); Symposium, *Racial Profiling: A New Road Hazard*, 3 RUTGERS RACE & L. REV. 1 (2001).

[150] *See* Sundby, *supra* note 5.

> Chief Justice Warren's opinion in *Terry* is almost excruciatingly cautious in his effort to explain the Court's departure from a norm of probable cause and to limit the consequences of such a departure. Reduced to its essence, the Chief Justice's holding is a relatively modest one, basically creating a limited right of "self defense" for a police officer who in carrying out her duties comes across someone whom she reasonably believes is armed and dangerous. The problem with *Terry,* therefore, lies not in its very limited upholding of stops and frisks (a holding most of the commentators in this Symposium find acceptable). Rather, *Terry*'s difficulty rests in the long-term consequences it sowed by casting the holding in terms of a broadly framed reasonableness balancing test. For although Chief Justice Warren's cautious opinion suggests that the use of the reasonableness balancing test was meant to be viewed as a narrow departure from the norm of probable cause, we now know that the test has taken on a life of its own.

Id. at 1135 (footnotes omitted). *But see* Akhil R. Amar, *Terry and Fourth Amendment First Principles*, 72 ST. JOHN'S L. REV. 1097 (1998).

> [*Terry*] failed to define "search" and "seizure" broadly enough: Sustained and purposeful surveillance by the unaided eye, the bad *Terry* implied, is not a Fourth Amendment "search" and thus, apparently, need not be reasonable. The bad *Terry* refused to retreat from earlier cases suggesting that warrants are required "whenever practicable" and that in most situations only "exigent circumstances" will excuse the lack of a warrant. The bad *Terry* offered no explanation—none whatsoever—why cops may sometimes search and seize without a warrant even in a situation where no probable cause exists and thus no warrant could lawfully be issued by a magistrate. . . . The bad *Terry* hinted at some of the factors that bear on reasonableness, but failed to develop a systematic account of these factors, needlessly leading civil libertarians to worry that under a proper reasonableness regime, government would have free rein. And to the extent the bad *Terry* could be read to imply that under a proper reasonableness

PART IV: DEVELOPMENT OF THE STOP AFTER *TERRY*

Four years after *Terry*, the Supreme Court (now without Chief Justice Warren) acknowledged what *Terry* never specifically, but impliedly, said: "A brief stop of a suspicious individual . . . may be most reasonable in light of the facts known to the officer at the time."[151]

Despite the *Terry* Court's acknowledgment of problems on the street when police use their power to harass certain groups, historically young black men and boys,[152] that Court failed to

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analysis, searching in the absence of individualized suspicion is always unconstitutional—that there must always be "specific" facts pointing to specific targets—the bad *Terry* offered civil libertarians false hope, and made a promise that the Court cannot keep if it means to be faithful to text, history, and common sense. Finally, the bad *Terry*, while acknowledging the flaws of the exclusionary rule, nevertheless pledged allegiance to it, and recycled silly arguments that the rule is somehow mandated by the Constitution and by sound legal principles.

Id. at 1099-1100.

[151] Adams v. Williams, 407 U.S. 143, 146 (1972).

[*Terry* and its companion cases] . . . were the first cases in which this Court explicitly recognized the concept of "stop and frisk" and squarely held that police officers may, under appropriate circumstances, stop and frisk persons suspected of criminal activity even though there is less than probable cause for an arrest. This case marks our first opportunity to give some flesh to the bones of *Terry et al.* Unfortunately, the flesh provided by today's decision cannot possibly be made to fit on *Terry*'s skeletal framework.

Adams, 407 U.S. at 153-54 (Marshall, J., dissenting).

[152] Harris, *supra* note 81.

In African-American communities, police did not so much follow the law as embody it; residents simply had to put up with whatever version of justice officers on the street chose to impose, no matter how brutal or unfair. By 1967, the abuse of blacks by police using stops and frisks—the very technique at issue in *Terry*—had become such a pervasive experience in inner city neighborhoods that the President's Commission on Law Enforcement and the Administration of Justice addressed the subject directly. "Misuse of field interrogations . . . is causing serious friction with minority groups in many localities. This is becoming particularly true as more police departments adopt 'aggressive patrol' in which officers are encouraged routinely to stop and question persons on the street."

Id. at 980-81 (footnotes omitted); *see also* RUSSELL, *supra* note 9.

Police harassment comes in many forms. It is also demonstrated by the number of times Black men are stopped, questioned, and assaulted by

develop controls on how that newly sanctioned power might be used.[153] By focusing on the moment when Officer McFadden

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police as they go about their daily lives. . . . The frequency of contact between Black men and the police has led a generation of Black men to teach their sons "The Lesson"—instructions on how to handle a police stop.

. . . .

Many black men have developed protective mechanisms to either avoid vehicle stops by police or to minimize the potential for harm during these stops. The primary shield they use is an altered public persona. This includes a range of adaptive behaviors, e.g., sitting erect while driving, traveling at the precise posted speed limit, avoiding certain neighborhoods, not wearing certain head gear (e.g., a baseball cap), and avoiding flashy cars.

. . . .

Black distrust of the justice system is not new. It is historically rooted in the role police played in enforcing the slave codes, Black codes, Jim Crow segregation, and the ultimate form of vigilante justice, lynching. In his treatise on race in America, Gunnar Myrdal reported that between 1920 and 1932, White police officers were responsible for more than half of all the murders of Black citizens. Historical accounts also show that White policemen were often present at lynchings. Today, police brutality barely resembles its past forms. Many Blacks alive today, however, still remember the widespread, persistent, and inhumane abuse Blacks suffered at the hands of police.

Id. at 34-35 (footnotes omitted).

[153] *See, e.g.,* United States v. Armijo, 781 F. Supp. 1551, 1554-55 (D.N.M. 1991). An officer questioned train passengers in New Mexico based on information he received from a train employee. *Armijo*, 781 F. Supp. at 1555. The informant indicated defendant as a possible drug courier because he "was a young, well-dressed Hispanic wearing a gold watch and gold ring travelling [sic] in the first class section." *Id.* at 1554. The officer followed the defendant to the parking lot where Mr. Armijo greeted his mother and placed his luggage in a car. *Id.* at 1555. The officer approached the defendant and asked him several questions before identifying himself as a DEA agent and asking for identification and permission to search the luggage in the trunk. *Id.* After the defendant refused the search, the officer threatened to "detain the car and Mr. Armijo's mother." *Id.* The court held that this was a seizure, and that "neither Mr. Armijo's race nor his refusal to consent constitute reasonable suspicion that a crime was being committed." *Id.* at 1557; *see also* Brown v. City of Oneonta, 221 F.3d 329 (2d Cir. 2000), *overruled in part*, Gonzaga Univ. v. Doe, 536 U.S. 273 (2002). An elderly woman, who had been attacked in her home, reported that the assailant was a black man. *Brown*, 221 F.3d at 334. Oneonta is a predominantly white town. *Id.* Police compiled a list of black students in town and made random stops of non-whites, but came up with no suspects. *Id.* A class action §1983 suit was filed, and several of the claims were dismissed on the premise that the men were never seized within the meaning of the Fourth Amendment. *Id.* at 335. On appeal, the Second Circuit Court of Appeals reversed the dismissals for three of the men,

grabbed Terry to conduct the frisk as the moment of seizure, the Court ignored the reality of citizen-police street encounters and the need for judicial oversight under the Fourth Amendment of such intrusions. But the *Terry* Court also ambivalently wrote that "[W]henever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person."[154] However, later Supreme Court decisions seized on that ambivalence and focused only on the physical seizure of Terry, thus continuously narrowing those situations that are subject to the reasonableness requirement.[155] The effect has been to eliminate very coercive police encounters from the scope of the Fourth Amendment guarantee of reasonableness, freeing the police on those occasions from all judicial oversight.

The Supreme Court developed the current standards in a series of cases in contexts which are inherently stressful and where government agents compounded that stress. Ironically, there is more Fourth Amendment protection in an automobile which is notoriously devoid of such protections because any stop of a moving vehicle is a seizure subject to the reasonableness standard.[156] A stop of a pedestrian is not as clear unless the officer specifically commands or otherwise compels the pedestrian to stop,[157] and the reasonableness standard does

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but upheld the rest because appellants failed to file affidavits. *Id.*

[154] *Terry*, 392 U.S. at 16.

[155] *See* United States v. Mendenhall, 446 U.S. 544 (1980); *see also* California v. Hodari D., 499 U.S. 621, 626 (1991). A police officer gave chase to a defendant who took flight at the sight of the officer. *Hodari D.*, 499 U.S. at 623. During the chase, the defendant discarded a rock of cocaine. *Id.* The Court held that the evidence was not a fruit of seizure because no physical force was applied before the evidence was dropped and even if the chase was considered a "show of authority," a seizure did not occur when the defendant had not yielded. *Id.*

[156] *See* Delaware v. Prouse, 440 U.S. 648, 653 (1979) ("[S]topping an automobile and detaining its occupants constitute a 'seizure' within the meaning of those Amendments."); United States v. Martinez-Fuerte, 428 U.S. 543, 556-58 (1976); Unites States v. Brignoni-Ponce, 422 U.S. 873, 876 (1975).

[157] Michigan v. Chesternut, 486 U.S. 567 (1988).

> [T]he police conduct . . . would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon respondent's freedom of movement. The record does not reflect that the police activated a siren or flashers; or that they commanded respondent to halt . . . [w]hile the very presence of a police car driving parallel to a running pedestrian could be somewhat intimidating, this kind of police presence does

not come into play until the suspect actually heeds the command.[158]

A. Airport Concourses

United States v. Mendenhall. This line of cases began with *United States v. Mendenhall*, where the United States Supreme Court could not agree when a Fourth Amendment seizure that would have activated the reasonableness test had taken place.[159] *Mendenhall* arose when a woman disembarking from an airplane in Detroit aroused the suspicions of Drug Enforcement Agency (DEA) agents present at the airport for the purpose of detecting unlawful trafficking in narcotics.[160] The agents approached the woman because it appeared to them that her conduct was characteristic of persons unlawfully carrying narcotics.[161] She arrived on a plane from Los Angeles;

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not, standing alone, constitute a seizure."

Id. at 575 (footnotes omitted).

[158] *Hodari D.*, 499 U.S. at 626 ("The narrow question before us is whether, with respect to show of authority as with respect to application of physical force, a seizure occurs even though the subject does not yield. We hold that it does not.").

[159] *Mendenhall*, 446 U.S. at 544.

[160] *Id.* at 547.

[161] *See* Mark J. Kadish, *The Drug Courier Profile: In Planes, Trains, and Automobiles; and Now in the Jury Box*, 46 AM. U. L. REV. 747 (1997).

> Police officers rely on drug courier profiles to justify stopping and questioning citizens about whether they are carrying illegal drugs. A nationally recognized profile does not exist; federal, state, local, and even individual law enforcement officials may have their own "profile." Citizens easily may match one of these profiles, because the profiles list general and often contradictory characteristics: traveling by plane, train, automobile, or bus; traveling alone, with friends, or with your children; being young, middle-aged, or "older"; having short or long hair; traveling to or from Fort Lauderdale, Miami, New York, Los Angeles, San Diego, Atlanta, Chicago, Detroit, Austin, Birmingham, Chattanooga, Charlotte, Dayton, Indianapolis, Kansas City, Newark, Tulsa, Dallas-Fort Worth, or any foreign country; traveling in a business suit, casual clothes, or disheveled clothing; paying cash for your ticket; traveling without checking your luggage, carrying only a garment bag, or checking several large suitcases; traveling and returning home in twenty-four to forty-eight hours; being nervous or anxious when traveling; glancing around the airport, bus, or train terminal; looking over your shoulder; making telephone calls immediately after arriving at your destination; and taking public transportation

she disembarked from the plane last and appeared nervous as she scanned the airport; she claimed no luggage; and she changed airlines for her flight out of Detroit.[162] The agents approached her and asked to see her identification and airline ticket.[163] The names on the ticket and driver's license were different, and Ms. Mendenhall indicated that she had been in California just two days.[164] When the officers identified themselves as federal narcotics agents, Ms. Mendenhall appeared shaken and nervous.[165] The agents returned her ticket and license and asked her to accompany them to the airport DEA office for further questioning.[166] Eventually, at the airport security office, Mendenhall turned over the narcotics she was carrying in her underclothing when the agents made it clear that she could not leave until she was searched.[167]

The admissibility of that evidence ultimately hinged on the nature of her presence in the security office. If Mendenhall's encounter with the DEA agents in the airport concourse and her trip to the security office constituted a forcible stop, it would have to meet the *Terry* standards for a lawful seizure. The factors that aroused the agents' suspicion turned on the "drug courier profile,"[168] an informal compilation of character-

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to your destination.

Id. at 748-49 (footnotes omitted).

[162] *Mendenhall*, 446 U.S. at 548 n.1.

[163] *See* Robert J. Burnett, *Random Police-Citizen Encounters: When is a Seizure a Seizure?* 33 DUQ. L. REV. 283 (1995).

> Many airport vice details throughout the United States utilize Walk and Talk drug interdiction programs ("Walk and Talk Programs") in order to approach and arrest airport travelers suspected of drug trafficking. These Walk and Talk Programs do not employ any type of drug courier profile and do not require the officers to have a reasonable suspicion that a person is engaged in criminal activity. Instead, the officers randomly approach individuals and ask them potentially incriminating questions about their travel plans and the contents of their luggage. The program is designed to elicit incriminating responses which ultimately may provide the officer with sufficient grounds to detain the passenger further.

Id. at 283 (footnotes omitted).

[164] *Mendenhall*, 446 U.S. 548.

[165] *Id.*

[166] *Id.*

[167] *Id.* at 549, 559.

[168] *Id.* at 548 n.1.

istics believed to be typical of persons unlawfully carrying narcotics, which in the same term as *Mendenhall* was described by the Court as "too slender a reed" on which to support a seizure.[169] If, on the other hand, there was no forcible stop and seizure of Ms. Mendenhall, the reasonableness of the agents' conduct would not be open to question.[170] The Supreme Court could not agree.

Two Justices, Stewart and Rehnquist, took the position that no seizure occurred because a reasonable person would have believed that she was free to ignore the agents' questions and requests and walk away.[171] The two Justices explained that a seizure could be recognized, even when the person does not attempt to leave, by the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.[172] Absent these indicia, the two Justices contended, "inoffensive conduct" between an individual and the police cannot, as a matter of law, amount to a seizure.[173] Justice Stewart was impressed by the fact that the agents returned Mendenhall's driver's license and airline ticket before requesting that she accompany them to the security office.[174] Consequently, even though Mendenhall may not, herself, have believed that she was free to ignore the agents, Justices Stewart and Rehnquist concluded that she had no objective reason

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[169] Reid v. Georgia, 448 U.S. 438, 440-41 (1980) (concluding that fitting the characteristics of a "drug courier profile" in and of itself is insufficient to justify detention). *But see* United States v. Sokolow, 490 U.S. 1, 10 (1989) (providing more leeway with drug courier profiles the Court explained, "[a] Court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion, but the fact that these factors may be set forth in a 'profile' does not somehow detract from their evidentiary significance as seen by a trained agent").

[170] *Mendenhall*, 446 U.S. at 552.

[171] *Id.* at 544 ("We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.").

[172] *Id.*

[173] *Id.* at 555.

[174] *Id.*

to believe that she could not end the conversation in the concourse and proceed on her way.[175]

Acceptance of the Stewart-Rehnquist formulation would have drastic consequences because it labels as consensual almost all police-citizen encounters that are not arrests and places them outside the purview of the Fourth Amendment and immune from review.[176] This formulation states that, as a matter of law, most encounters between citizens and police are consensual and purports to adopt objective criteria to determine this issue. At the outset, this is a view of the world which is inconsistent with how most people untrained in law would see the situation. Few would believe they are free to ignore an officer's requests for information and cooperation.[177] Someone

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[175] *Id.*

[176] *See* Commonwealth v. Lidge, 582 A.2d 383, 384-85, 387 (Pa. 1990). The officers apprehended a woman in an airport because she fit a drug courier's profile. *Lidge*, 582 A.2d at 363-65. They sat on both sides of her, questioned her, and having received consent, searched her bags. *Id.* at 364-65. The court held that "appellant was not detained in any manner. She engaged in a consensual conversation in a public place with the police officers." *Id.* at 368; *see also* People v. Johnson, 865 P.2d 836, 837-38, 843 (Colo. 1994). The appellate court reversed the district court's decision to suppress evidence. *Johnson*, 865 P.2d at 837. Officers apprehended defendant after they saw him jogging to a payphone in an airport. *Id.* at 837-38. The officers asked him several questions, checked his identification and ticket and, with permission, searched his bag. *Id.* at 838. The officers found six ounces of cocaine. *Id.* The court held that because the officers used a conversational tone, did not display a weapon, and held the defendant for only a few minutes, the defendant had not been seized. *Id.*

[177] *See* Daniel J. Steinbrock, *The Wrong Line Between Freedom and Restraint: The Unreality, Obscurity and Inclivity of the Fourth Amendment Consensual Encounter Doctrine*, 38 SAN DIEGO L. REV. 507 (2001).

> The doctrine of consensual encounters, as established by the Supreme Court and administered by the lower courts, is by and large a fictional construct, exempting from the coverage of the Fourth Amendment significant interferences with personal liberty. The Supreme Court's doctrine is flawed in conception by its use of the reasonable person standard, and its picture of a reasonable person is simply out of touch with societal reality. Briefly put, most people have neither the knowledge nor the fortitude to terminate unwanted interactions with the police.

Id. at 521-22; *see also* Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003).

> Consider also the Court's suspect holding that brief police-citizen encounters on the street and on public transportation are 'consensual,' despite the fact that such encounters are often tense even when the cit-

izen is innocent. That holding is much more likely to affect the poor, who spend relatively more of their time on the street. Similarly, living in a high crime (poor) neighborhood, while not sufficient in itself to give police reasonable suspicion to stop individuals, can authorize detention on relatively little else, such as when the person runs from the police, despite the fact that many poor people, especially African-American ones in certain urban areas, do not want to deal with the police even when innocent of any crime.

Id. at 405 (footnotes omitted); *see also* Maclin, *supra* note 112.

In the unrealistic world of *Mendenhall*, the average citizen feels free to ignore a police officer who has approached her. In this abstract world, it is irrelevant whether the citizen is aware of her right to ignore the officer. In the real world, however, few people are aware of their [F]ourth [A]mendment rights, many individuals are fearful of the police, and police officers know how to exploit this fear. If *Mendenhall* had dealt with the issue candidly, it would have acknowledged that the average person does not feel free to leave a police encounter. If a person is unlikely to ignore an officer's approach, and is equally unlikely to know of her right to depart, is the Court really serious in believing that the average person will exercise her right to do so?

Realistically, the Justices probably do not believe that the typical police-citizen encounter is the equivalent of two old friends greeting each other on the street corner. Professor Kamisar has given a more plausible explanation for the *Mendenhall* standard. He observed that the standard is actually a "policy decision that the police should be allowed to rely on the moral and instinctive pressure to cooperate inherent in [police-citizen] encounters by *not treating them* as "seizures" for Fourth Amendment purposes.

Id. at 1300-01 (footnotes omitted); Burnett, *supra* note 163.

The application of the *Mendenhall/Royer* test has unfortunately created a vast category of police-citizen encounters which fall outside the parameters of the Fourth Amendment. In reality, most citizens do not feel free *to end an encounter* with police when randomly approached in an airport terminal or other similar public venues. Despite the obvious restraint on liberty, these police-citizen encounters fall outside the Fourth Amendment and are regrettably characterized as mere encounters or nonseizures because, in the Supreme Court's view, a reasonable person would feel free to end the encounter and walk away. As long as the police officer is polite, non-accusatory and calm, a court applying *Mendenhall/Royer* will readily find that a reasonable person would have felt free to leave or disengage the encounter. Accordingly, no seizure has occurred and the police have not triggered the protections of the Fourth Amendment. More importantly, police using such consensual tactics do not need justification for the initial questioning and can approach and interrogate anyone as long as they do not cross the magical threshold.

. . . .

Herein lies the problem. If the citizen refuses to reply or walks away, the authorities will deem such refusal to cooperate as justification

in Mendenhall's situation complies with the request because she believes that she must. This is true in airports and on inner city streets. Absent some hesitation on the part of an individual in Mendenhall's situation, we are unlikely to see police react in a way that would have proved to Justices Stewart and Rehnquist that Mendenhall was not free to ignore the agents' requests. Justice Stewart maintained that no Fourth Amendment interest would be served by inquiring into the reasonableness of the agents' behavior. It seems that the proper question is the opposite of the one Stewart asked: whether any legitimate interest is served by not evaluating police conduct of this sort by the reasonableness-balancing test advanced in *Terry*.

The other six Justices disagreed with the extreme Stewart-Rehnquist analysis and concluded that a *Terry* seizure had taken place. Even so, they split down the middle: Burger, Powell and Blackmun concurred with Stewart and Rehnquist on the ground that the seizure was justified by reasonable and articulable suspicion of criminal activity.[178] The three dissenting Justices, Brennan, White and Marshall, argued that Ms. Mendenhall's conduct was insufficient to provide reasonable suspicion that she was engaged in criminal activity and that

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> for a prolonged detention. Conversely, if the citizen answers the initial, generalized questions and no suspicion or criminality is exposed, the officer will often escalate the encounter by asking the individual if he would consent to a luggage or body search. In either scenario, the intrusion is escalated without justification.

Id. at 287-88 (emphasis added); *see also* Wayne R. LaFave, *Two Hundred Years of Individual Liberties: Essays on the Bill of Rights: Pinguitudinous Police, Pachydermatous Prey: Whence Fourth Amendment "Seizures"?*, 1991 U. ILL. L. REV. 729 (1991).

> *[M]endenhall-Royer* is not merely a "reasonable person" test, nor even a "reasonable innocent person" test, but rather a "reasonable innocent pachydermatous person" test, for the Court finds a perceived freedom to depart in circumstances when only the most thick-skinned of suspects would think such a choice was open to them.

Id. at 739-40; *see also* Michelle R. Ghetti, *Seizure Through the Looking Glass: Constitutional Analysis in Alice's Wonderland*, 22 S.U. L. REV. 231 (1995) (providing a creative analysis comparing Fourth Amendment consensual encounter jurisprudence to the fictional world portrayed in Alice's Wonderland).

[178] *Mendenhall*, 466 U.S. at 560 (Powell, J., concurring).

the agents' treatment of her was indistinguishable from a traditional arrest.[179] The majority forged in *Mendenhall* results from the joining of two Justices who did not believe that the defendant had been seized, and three justices who did believe that she was seized but that the seizure was reasonable. While this type of fragmentation offers little guidance, it is a clear indication that a narrow majority of the Court was prepared to allow the police substantial latitude in the absence of physical contact or removal to the police station.

Florida v. Royer. In 1983, again in a case involving the stopping of a suspected drug courier, the Court attempted to clarify the position advanced in *Mendenhall.* While the Court in *Florida v. Royer*[180] remained unable to put together a majority opinion, by combining the plurality's positions with some of those offered by Justice Brennan (who provided the fifth vote) and still others put forward by the four dissenters, several propositions emerged that were supported by a majority of the Supreme Court. Eight Justices were in agreement that the police officer who approached a suspected drug courier at an airport concourse did not violate the Fourth Amendment by that approach and request for identification because it was not a seizure activating the Terry reasonableness test requiring objective justification for the intrusion.[181] Four of those Justices, however, along with Justice Brennan, took the position that the consensual aspects of the encounter evaporated[182] when police

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[179] *Id.* at 572-74 (White, J., dissenting).

[180] 460 U.S. 491 (1983).

[181] *Royer*, 460 U.S. at 502.

[182] *Id.* at 503; *see also* INS v. Delgado, 466 U.S. 210 (1984).

> Although we have yet to rule directly on whether mere questioning of an individual by a police official, without more, can amount to a seizure under the Fourth Amendment, our recent decision in Royer, . . . plainly implies that interrogation relating to one's identity or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure. In Royer, when Drug Enforcement Administration agents found that the respondent matched a drug courier profile, the agents approached the defendant and asked him for his airplane ticket and driver's license, which the agents then examined. A majority of the Court believed that the request and examination of the documents were "permissible in themselves."

Id. at 216 (emphasis added).

escorted the suspect to the police interrogation room at the airport while the officers retained his ticket and identification, removed his luggage to the interrogation room and did not inform him that he was free to leave. The Justices concluded that "[a]s a practical matter, Royer was under arrest"[183] and that it was reasonable for him to believe that he was being detained. The plurality asserted that there "were adequate grounds for suspecting Royer of carrying drugs and for temporarily detaining him and his luggage while they attempted to verify or dispel their suspicions in a manner that did not exceed the limits of an investigative detention."[184]

The critical difference between *Mendenhall* and *Royer*[185]

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[183] *Royer*, 460 U.S. at 503.

[184] *Id.* at 502. Implicit in the plurality's statement is that seizing luggage during an investigatory stop is not a violation of Fourth Amendment protection so long as the police have reasonable suspicion. *But see id.* at 509-10 (Brennan, J., concurring).

> [M]ost of the plurality's discussion of the permissible scope of *Terry* investigative stops is also unnecessary to the decision.
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> . . . .
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> The scope of a *Terry*-type "investigative" stop and any attendant search must be extremely limited or the *Terry* exception would "swallow the general rule that Fourth Amendment seizures [and searches] are "reasonable" only if based on probable cause."

Id. at 509-10 (quoting Dunaway v. New York, 442 U.S. 200, 213 (1979)); *see also* United States v. Place, 462 U.S. 696 (1983) (Brennan, J., concurring).

> In some respects the Court's opinion in this case can be seen as the logical successor of the plurality opinion in *Florida v. Royer*. . . . [T]he Court today goes well beyond in endorsing the notion that the principles of *Terry* permit "warrantless seizures of personal luggage from the custody of the owner on the basis of less than probable cause, for the purpose of pursuing a limited course of investigation, short of opening the luggage, that would quickly confirm or dispel the authorities' suspicion." . . . [T]his suggestion finds no support in *Terry* or its progeny and significantly dilutes the Fourth Amendment's protections against government interference with personal property.

Place, 462 U.S. at 714-15 (Brennan, J., concurring) (citations omitted).

[185] *See* Edwin J. Butterfloss, *Bright Line Seizures: The Need for Clarity in Determining When Fourth Amendment Activity Begins*, 79 J. CRIM. L. & CRIMINOLOGY 437 (1988).

> The divergent results, despite similar facts, of the two Supreme Court cases that formulated the *Mendenhall-Royer* test are indicative of the difficulty in applying the test. The only factual difference between the two cases at the point the plurality found Royer was seized was the re-

was that the officers in *Royer* kept the defendant's ticket and identification.[186] According to the plurality, Royer quickly changed into an illegal arrest because the officers had possession of his ticket and identification as well as his luggage and, as a practical matter, the suspect could not leave the airport without them.[187] Moreover, the suspect was not informed that he need not consent to a search of his luggage, which the plurality felt was very significant even though that type of warning is not generally a prerequisite to a valid consensual search.[188] Obviously, the retention of the travel documents in Royer was essential to the plurality's conclusion that a consensual encounter had been transformed into a *Terry*-type seizure and then an arrest.[189] Such a show of authority is sufficient to justify a reasonable belief that the individual who is stopped is not free to leave.[190]

> tention of Royer's airline ticket and identification. Yet the results are vastly different. Justice Stewart did not even find that Mendenhall had been seized during her ordeal, while the plurality found that Royer was not only seized, but also arrested. Moreover, in finding a seizure of Royer, the plurality pointed to facts that also were present in *Mendenhall*. The Court's cases following *Mendenhall* and *Royer* provide no further elucidation.

Id. at 451 (footnotes omitted).

[186] *Royer*, 460 U.S. at 503 n.9.

[187] *Id.*

[188] *Id.*

[189] The Court was unable to put together a majority that agreed on whether retention of identification constituted a seizure in Royer. Subsequent courts have only further complicated the matter. *Compare* McLellan v. Commonwealth, 554 S.E.2d. 699, 701 (Va. Ct. App. 2001) (holding that "an officer's subjective evaluation of the situation is not binding" on the court) *with* Piggott v. Commonwealth, 537 S.E.2d 618, 619 (Va. Ct. App. 2000) (holding that a passenger in a car was seized when the officer retained his ID the court stated, "[T]he consensual aspect of the encounter ceased when Detective Langford retained Piggott's identification while he ran a warrant check. A reasonable person in Piggott's circumstances would not have believed that he could terminate the encounter and walk away.").

[190] *See* Burnett, *supra* note 163.

> The *Mendenhall/Royer* analysis is clearly insufficient. The current application of the test is incompatible with the mandate of *Terry*. In *Terry*, the Supreme Court specifically warned of the danger of isolating the initial stages of police-citizen encounters from constitutional safeguards. The Court feared that the removal of judicial scrutiny would eliminate the only effective deterrent to police misconduct. The Court's solemn concern has flourished under *Mendenhall/Royer*. Many of the encounters

Florida v. Rodriguez. The line between consensual encounters that raise no Fourth Amendment reasonableness inquiries and *Terry*-stops that must be supported by reasonable suspicion remains undrawn. Following *Mendenhall* and *Royer*, the Court, in *Florida v. Rodriguez*,[191] was faced with yet another case involving an airport encounter between police officers and suspected drug couriers. Three travelers who aroused police suspicion specifically tried to avoid contact with the police officers, and the defendant, who unsuccessfully attempted to avoid confronting the officers by going the wrong way on an escalator, directed profanity at the officers.[192] The officer "suggested" that the defendant step aside about fifteen feet, which

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initiated by police now fall outside the protections afforded by the Fourth Amendment. The absence of the Fourth Amendment protection encourages the absolutely random detention of innocent citizens.

Id. at 305-06 (footnotes omitted); *see also* Butterfoss, *supra* note 185.

> [L]iteral application of the *Mendenhall-Royer* "free-to-leave" test would result in virtually all police-citizen encounters being characterized as seizures and thereby eliminate the "non-seizure" category of such encounters.
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> Nevertheless, the test has not been applied—nor was it intended to be applied—in such a manner. Rather, as stated above, precisely the opposite has occurred. Application of the test has created a broad "nonseizure" category of police-citizen encounters that permits officers substantial leeway in approaching and questioning citizens without being required to show objective justification for such conduct. This has been accomplished both by constructing a highly artificial "reasonable person," who is much more assertive in encounters with police officers than is the average citizen, and by ignoring the subjective intentions of the officer. The result is that [F]ourth [A]mendment rights of citizens are determined through a legal fiction. In many encounters with citizens, police conduct is not scrutinized under the [F]ourth [A]mendment because in the courts' view a reasonable person would feel free to end the encounter and walk away. However, given the reality that citizens virtually never feel free to walk away from an encounter initiated by a police officer, most of the citizens in these "nonseizure" encounters do not feel free to walk away. Moreover, in a significant number of these "nonseizure" cases, the police officers involved testified that the citizen in fact was *not* free to leave. The result is that citizens do not feel free to end encounters with police and who, in fact, would not be permitted to do so, are left outside the scope of the [F]ourth [A]mendment protections because the reasonable person constructed by the courts would have felt free to leave.

Id. at 439-40 (footnotes omitted).

[191] 469 U.S. 1 (1984) (per curiam).

[192] *Rodriguez*, 469 U.S. at 3-4.

he did.[193] The officer then requested and was granted permission to search the defendant's suitcase.[194] Three bags of cocaine were found during the search.[195] The officer testified at the suppression hearing that until the cocaine was found, the three were free to leave.[196]

The Supreme Court held that the initial encounter between the defendant and the police officers, "where they simply asked if he would step aside and talk with them, was clearly the sort of consensual encounter that implicates no Fourth Amendment interests."[197] The Court's analysis was disingenuous. A consensual encounter is one that implies that the individual is free to avoid the encounter altogether or to terminate it at will. In each of the three airport encounter cases, the defendants complied with persistent police requests. In *Rodriguez*, the defendant's behavior clearly indicated an intention to avoid the police but an inability to do so. It is difficult to conclude that anyone in the defendant's position, after manifesting his intent to avoid the confrontation, would reasonably believe that he need not step aside and talk with police officers. Moreover, the Court refused to characterize the additional intrusion when the defendant was asked to move fifteen feet out of the traffic on the concourse as a *Terry*-stop.[198]

B. Close Encounters

INS v. Delgado. The definition of seizure became more opaque in several cases involving questioning in close spaces. In *INS v. Delgado*, Immigration and Naturalization Service agents conducted surveys of the work force at several factories in search of illegal aliens.[199] Each survey lasted more than an hour.[200] Agents positioned themselves near the factory exits to make sure than none of the employees left without being ques-

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[193] *Id.* at 4.
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.* at 5.
[198] *See id.* at 5.
[199] INS v. Delgado, 466 U.S. 210, 211-12 (1984).
[200] *Delgado*, 466 U.S. at 214.

tioned.[201] Other agents circulated through the work area asking each employee questions relating to the employee's citizenship and status in the United States.[202] During the questioning, the employees were permitted to continue working and were free to circulate on the work floor, provided that no one attempted to leave before being questioned.[203] "The agents displayed badges, carried walkie-talkies and were armed," but no agent drew a weapon during the surveys.[204]

Drawing from the airport cases, Justice Rehnquist, writing for the majority, appeared to adopt a bright-line rule.

> [P]olice questioning, by itself, is unlikely to result in a Fourth Amendment violation. . . . Unless the circumstances of the encounter are so intimidating as to demonstrate that a reasonable person would have believed he was not free to leave if he had not responded, one cannot say that the questioning resulted in a detention under the Fourth Amendment. But if the person refuses to answer and the police take additional steps—such as those taken in *Brown*[205]—to obtain an answer, then the Fourth Amendment imposes some minimal level of objective justification to validate the detention or seizure.[206]

The Court rejected the claim that the entire work force had been seized.[207] The Court said that the inability of the workers to leave was part of the ordinary arrangement between employers and workers: "Ordinarily, when people are at work their freedom to move about has been meaningfully restricted,

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[201] *Id.* at 212.

[202] *Id.*

[203] *Id.* at 213.

[204] *Id.* at 212.

[205] Brown v. Texas, 443 U.S. 47 (1979). Officers observed the defendant walking in a "high drug problem area," and although he was not engaged in any criminal activity and there was no reason to believe that he was carrying a weapon, the officers stopped him and asked for identification. *Brown*, 443 U.S. at 49. When the defendant refused, the officers frisked him, found nothing, yet arrested him for violation of a "stop and identify" statute. *Id.* The Court held the defendant was unreasonably seized within the meaning of the Fourth Amendment. *Id.* at 52.

[206] *Delgado*, 466 U.S. at 216-17.

[207] *Id.* at 218.

not by the actions of law enforcement officials, but by the workers' voluntary obligations to their employers."[208] Even though some workers tried to hide from the agents, the Court concluded that the presence of agents at the doors did not elevate the encounter to a Fourth Amendment seizure.[209]

> Respondents argue, however, that the stationing of agents near the factory doors showed the INS's intent to prevent people from leaving. But there is nothing in the record indicating that this is what the agents at the doors actually did. The obvious purpose of the agents' presence at the factory doors was to insure that all persons in the factories were questioned. The record indicates that the INS agents' conduct in this case consisted simply of questioning employees and arresting those they had probable cause to believe were unlawfully present in the factory. This conduct should have given respondents no reason to believe that they would be detained if they gave truthful answers to the questions put to them or if they simply refused to answer. If mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the exits.[210]

Having found that the employees were not seized, the Court incredibly concluded that the respondents also were free not to cooperate.[211]

Justice Brennan dissented and accused the Court of misapplying its own test.[212] Applying the governing test, whether or

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[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] *Id.* at 220-21.

> While persons who attempted to flee or evade the agents may eventually have been detained for questioning, respondents did not do so and were not, in fact, detained. The manner in which respondents were questioned, given its obvious purpose, could hardly result in a reasonable fear that respondents were not free to continue working or to move about the factory. Respondents may only litigate what happened to them, and our review of their description of the encounters with the INS agents satisfies us that the encounters were classic consensual encounters rather than Fourth Amendment seizures.

Id. (citations omitted).

[212] *Id.* at 228 (Brennan, J., dissenting) (quoting *Mendenhall*, 466 U.S. at 554).

not a reasonable person would believe that he is free during the course of the questioning to disregard the questions and walk away, Justice Brennan concluded:

> Although none of the respondents was physically restrained by the INS agents during the questioning, it is nonetheless plain beyond cavil that the manner in which the INS conducted these surveys demonstrated a "show of authority" of sufficient size and force to overbear the will of any reasonable person. Faced with such tactics, a reasonable person could not help but feel compelled to stop and provide answers to the INS agents' questions.[213]

The *Delgado* majority's reasoning is absurd. Justice Rehnquist's reference to the consensual nature of an encounter when citizens are asked questions by police ignores the very nature of the group questioned in *Delgado* and the desperate situation faced by undocumented aliens.[214] To conclude that these workers were free to refuse to cooperate with the INS

> [Justice Stewart's] opinion also suggested that such circumstances might include "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled."
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> A majority of the Court has since adopted that formula as the appropriate standard for determining when inquiries made by the police cross the boundary separating merely consensual encounters from forcible stops to investigate a suspected crime.

Id. (citations omitted).

[213] *Id.* at 229 (Brennan, J., dissenting).

[214] *See* Devon W. Carbado, *(E)racing the Fourth Amendment*, 100 MICH. L. REV. 946 (2002).

> While Justice Rehnquist may want us to believe (or may himself think) that he is applying a race neutral standard, in fact he is not. To begin with, the "any reasonable person" category presumably includes Latinas/os. Latinas/os and non-Latinas/os, however, are likely to perceive the INS in different ways. Whether or not Latinas/os are documented, they are, on the whole, more likely than non-Latinas/os to be apprehensive about encounters with the INS. Given the difference between how Latinas/os and non-Latinas/os are likely to respond to INS authority, Justice Rehnquist's unmodified reasonable-person approach is fictional. Specifically, it creates the misimpression that there is a neutral identity position from which to ask the seizure question.

Id. at 995-96 (footnotes omitted).

agents is outrageous because it ignores the facts of the case. Further, Justice Rehnquist dismisses the workers' claim that the INS agents prevented them from leaving on the theory that the work rules prevented them from leaving. However, the fact was that INS agents prevented the workers from leaving until they answered the INS agents' questions.

Working the Buses. In *Florida v. Bostick*,[215] police engaged in a practice called "working the buses," where they boarded buses shortly before departure and asked some or all of the passengers, without individualized suspicion, for information about themselves, their destination, and for permission to search their luggage for drugs.[216] The Florida Supreme Court found the encounter to be fraught with coercion because the officers would stand over the individual questioned and block the aisle which effectively prevented a person from leaving[217] Consequently, despite the trial court's finding of fact that the officers informed the defendant that he did not have to consent to a search, the Florida high court characterized the encounter as a seizure that was rendered unconstitutional because of the lack of individualized suspicion.[218]

The United States Supreme Court disagreed, emphasizing that a seizure does not occur every time an officer approaches a citizen in public and questions that person.[219] The Court said that if the encounter had taken place inside the bus terminal or before the passenger boarded the bus, it would not have risen to the level of a seizure.[220] The fact that the encounter took place in the cramped confines of a bus did not render the situation qualitatively different. The Court stated that "the mere fact that Bostick did not feel free to leave the bus does not mean that the police seized him."[221] Rather, the compulsion to remain rather than depart was the result of something other than the conduct of the law enforcement officers, accord-

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[215] 501 U.S. 429 (1991).
[216] *Bostick*, 501 U.S. at 433.
[217] *Id.*
[218] *Id.* at 434.
[219] *Id.*
[220] *Id.*
[221] *Id.* at 436.

ing to the Court.[222] Instead, the right question, the majority wrote, is whether a reasonable person would feel free to decline the police request to search and otherwise terminate the encounter.[223]

The Supreme Court ignored the fact that most persons riding interstate buses have far less influence and economic and political power than airplane passengers.[224] Bus passengers are less likely to feel free to refuse a police request and more likely to believe that a police request is an order, regardless of the actual words used to make the request, an impression that is heightened by the physical dominance of the officer blocking the aisle and standing over the seated passenger.[225] The political consequences of such behavior on an airplane would be far different from the consequences when the target is a bus.

It is inconceivable that police would "sweep the planes" for drugs, regularly delaying departures while police officers on the plane asked to see identification and tickets and requested permission to search carry-on luggage. The dissenters commented:

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[222] *Id.*

[223] *Id.*

[224] *See* Slobogin, *supra* note 177, at 406 ("Relative wealth makes a difference in search and seizure. . . . [T]here are fairly robust indications that the Court's caselaw affords the poorer people in our country much less protection of their privacy and autonomy than those who are better off.").

[225] *See* LaFave, *supra* note 177.

> Even if it is generally true that police encounters with pedestrians, including travelers who become ensnared in drug courier detection activities at airports, are *not* seizures, the confrontations which occur on buses as a part of suspicionless police sweeps nonetheless ought to be deemed seizures because they are dramatically different in terms of the character of the police activity involved and its impact upon the reasonable traveler. This difference, essentially, comes down to these two propositions: (i) the police dominance of the situation manifested by their sweep activity, undertaken with the obvious connivance of the common carrier to which bus travelers have entrusted their care, is highly coercive because it is so unlike any contact which might occur between two private citizens; (ii) that dominance has a uniquely heavy impact upon bus travelers precisely because they do not, as a practical matter, have available the range of avoidance options which pedestrians and airport travelers might utilize.

Id. at 746-47.

> By consciously deciding to single out persons who have undertaken interstate or intrastate travel, officers who conduct suspicionless, dragnet-style sweeps put passengers to the choice of cooperating or of attempting to exit their buses and possibly being stranded in unfamiliar locations. It is exactly because this "choice" is no "choice" at all that police engage in this technique.[226]

The Supreme Court revisited the issue in *United States v. Drayton*,[227] which presented significantly different facts from the earlier case. In *Drayton*, three police officers boarded an interstate bus at a rest stop just prior to the bus's departure.[228] One officer moved to the back of the bus; the second stayed in the front by the exit; and the third officer, Lang, worked his way from rear to front speaking with the passengers and asking permission to search their luggage and persons.[229] Officer Lang did not advise the passengers that they could refuse permission, unlike the investigators in *Bostick*.[230] The defendant was traveling with another man.[231] When the officer came up to Drayton and his companion, he told them they were looking for drugs and weapons.[232] He asked if they had any luggage, and both men pointed to the suitcase in the overhead luggage rack.[233] Lang asked if he could check; a search of the bag revealed no contraband.[234] Then Lang asked Drayton's companion if he could check his person; the companion agreed.[235] A pat-down revealed hard objects similar to "drug packages" in both thigh areas.[236] At that point, the companion was arrested and removed from the bus.[237] Officer

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[226] *Bostick*, 501 U.S. 450.
[227] 536 U.S. 194 (2002).
[228] *Drayton*, 463 U.S. at 197.
[229] *Id.* at 198.
[230] *Id.*
[231] *Id.*
[232] *Id.*
[233] *Id.*
[234] *Id.*
[235] *Id.* at 199.
[236] *Id.*
[237] *Id.*

Lang then asked Drayton if he could check him, and Drayton agreed.[238] The pat-down revealed similar objects as were found on the companion, and Drayton was arrested.[239]

The United States Court of Appeals for the Eleventh Circuit reversed the convictions, holding that passengers do not feel free to disregard an officer's request for permission to search unless they are given some positive indication that consent may be refused.[240] The United States Supreme Court reversed and rejected the Eleventh Circuit's bright-line rule that evidence seized during suspicionless drug interdictions on buses must be suppressed unless police advise passengers that they have the right to refuse.[241] The Court drew conclusions opposite from those drawn by the Eleventh Circuit.

> Applying the *Bostick* framework to the facts of this particular case, we conclude that the police did not seize respondents when they boarded the bus and began questioning passengers. The officers gave the passengers no reason to believe that they were required to answer the officers' questions. When Officer Lang approached respondents, he did not brandish a weapon or make any intimidating movements. He left the aisle free so that respondents could exit. He spoke to passengers one by one and in a polite, quiet voice. Nothing he said would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter.[242]

The Court concluded that such an encounter on the street would have been consensual, and the fact that it takes place on a bus does not convert it into an illegal seizure.[243]

> There was no application of force, no intimidating movement, no overwhelming show of force, no brandishing of weapons, no blocking of exits, no threat, no command, not even an authori-

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[238] *Id.*

[239] *Id.*

[240] United States v. Drayton, 231 F.3d 787, 790-91 (11th Cir. 2000); *rev'd*, 536 U.S. 194 (2002).

[241] *Drayton*, 536 U.S. 202-03.

[242] *Id.* at 203-04.

[243] *Id.* at 204.

> tative tone of voice. It is beyond question that had this encounter occurred on the street, it would be constitutional. The fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure. Indeed, because many fellow passengers are present to witness officers' conduct, a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances.[244]

Nor did the fact that the officer displayed his badge turn the encounter into a seizure. Relying on *Delgado*, the majority said, "[w]hile most citizens will respond to a police request, the fact that people do so, and do so without being told that they are free not to respond, hardly eliminates the consensual nature of the response."[245] Further, the majority rejected the defendant's claim that the arrest of his companion turned the encounter into a seizure because no reasonable person would then feel free to refuse cooperation.[246] "If anything," the Court said, "Brown's arrest should have put Drayton on notice of the consequences of continuing the encounter by answering the officers' questions. Even after arresting Brown, Lang addressed Drayton in a polite manner and provided him with no indication that he was required to answer Lang's questions."[247]

It is very hard to imagine that either Brown (the traveling companion) or Drayton would have believed that he stood to lose nothing if he refused to cooperate with the police, or that he had a choice to ignore the police altogether. No reasonable passenger could have believed that, only an uncomprehending one.

The sum of all these cases from *Terry* to *Drayton* is that the government advocated (1) expanding police power to extend to investigatory stops on less than probable cause and (2) narrowing the definition of "stop" to exclude most citizen-police encounters. In other words, state, local and federal governments sought extended power for police and, once that power

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[244] *Id.* (citations omitted).
[245] *Id.* at 205 (quoting *Delgado*, 446 U.S. at 216).
[246] *Id.* at 206.
[247] *Drayton*, 536 U.S. at 206.

was granted, spent the next thirty years persuading the Court to exclude most citizen-police encounters from the limits imposed on the extended powers. Only when an officer verbally indicates that the citizen must stop or utilizes other forcible means is the government put to its proof to show that there was reasonable cause to justify the stop. The prosecution must offer its proof only where a reasonable person would not feel free to walk away and ignore the police officer's questions or, where walking away is not at issue, to refuse the officer's request for cooperation. *Terry* opened the door for this outcome by focusing on the moment that Officer McFadden grabbed Terry and spun him around. The reality is that Terry and his companions no longer had the liberty to ignore Officer McFadden and walk away once McFadden walked up to them outside the men's store, ordered them to keep their hands out of their pockets, and asked their identities.

What is missing in all of these cases is an understanding of the power differential between law enforcement agents and citizens. The reasonable person, untrained in this area of the law, simply does not believe that ignoring a police request is an option.[248] Unless trained in the law, people are not aware of their rights in the context. Moreover, police officers exploit that ignorance and create the impression that the person does not have a choice. When a patrol car closely follows a pedestrian,[249] when a police officer persists in asking a person to stop

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[248] State v. Baldwin, 686 So. 2d 682, 683-85 (Fla. Dist. Ct. App. 1996). The police observed two men loitering in a high crime area. *Baldwin*, 686 So. 2d at 683. The police admitted that the two men were not engaging in any suspicious activities, but approached the men nonetheless. *Id.* Defendant refused to be searched, but did not leave the scene while police searched his friend. *Id.* The officers repeatedly told the defendant to get his hands out of his pockets. *Id.* The officers then saw defendant throw something to the ground, at which point they physically detained him. *Id.* at 683-84. The court held that the officer requested, not commanded, defendant to take his hands out of his pockets. *Id.* at 685. That distinction kept the encounter from being an illegal detention. *Id.*

[249] *See generally* Michigan v. Chesternut, 486 U.S. 567 (1988); *see also* Maclin, *supra* note 112.

> *Chesternut* reflects the current Court's unwillingness or inability to empathize with those citizens who are subjected to police scrutiny. Is the Court credible when it says that "people are not shorn of all Fourth Amendment protection when they step from their homes onto public side-

and answer questions in an airline terminal when the traveler has tried to ignore or evade the officer,[250] or when a law enforcement officer is blocking exits and leading some people away,[251] it is the height of folly to think people have a real choice.[252] Moreover, during these encounters police officers

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walks," but then holds that the police are free to chase individuals up and down the streets, provided their actions are not "so intimidating"? Perhaps the result in *Chesternut* is due to the fact that none of the Justices has been recently chased down public streets by a police car. After *Chesternut*, if people want to feel secure on the streets, they had better be track stars. The use of the right-to-inquire rule has undermined the Court's ability to credibly define when a person has been seized. The Court has expanded the rule to a point where a government's desire to chase, stop, and question persons has become more important than the citizen's right to come and go as he pleases.

Id. at 1307 (footnotes omitted).

[250] *See generally* Florida v. Rodriguez, 469 U.S. 1 (1984) (per curiam); *see also Mendenhall*, 446 U.S. at 544.

[251] *See generally Delgado*, 466 U.S. 210; *see also Drayton*, 536 U.S. 194.

[252] *See* Anderson, *supra* note 146.

In the consent jurisprudence of the Rehnquist Court that related to search and seizure matters, the logic of *Schneckloth* and *Mendenhall* ultimately became the standard for evaluating the adequacy of consent. Thus, since the law would rarely deny police the fruit of their aggressive investigations, the scales were tipped in their favor and they were thereby encouraged to press hard to obtain consent even though their conduct may well have been coercive to the average citizen. The Supreme Court's lukewarm regard for protecting citizens from aggressive police efforts to obtain consent to search during routine investigations created a severe accountability vacuum that encouraged police abuse.

Id. at 741; *see also* Ronald J. Bacigal, *In Pursuit of the Elusive Fourth Amendment: The Police Chases*, 58 TENN. L. REV. 73, 78-79 (1990).

The present Supreme Court, however, appears to have lost sight of *Terry*'s even-handed approach to the [F]ourth [A]mendment. While continuing to lessen the government's burden to establish the constitutional reasonableness of its conduct, there has been no corresponding expansion of the suspect's zone of protected privacy and liberty. Instead, the Court has narrowed the coverage of the [F]ourth [A]mendment by holding that more and more law enforcement activity is excluded from the definition of search and seizure. This on-going contraction of the [A]mendment's scope follows a pattern in which the facts of the particular case suggest that the police cannot justify their actions as constitutionally reasonable, yet the Court will conclude that the police conduct is a desirable part of the war on crime. In such situations the police conduct can receive Court approval only if it is placed beyond the coverage of the [F]ourth [A]mendment, thereby eliminating any requirement of constitutional rea-

is held to have occurred have been negatively affected by the decision in *Terry*. The reasonableness standard utilized in *Terry* is flawed and has resulted in a further erosion of Fourth Amendment protections. Chief Justice Warren's majority opinion never used the term "reasonable suspicion," instead writing of "unusual conduct" which leads a police officer "reasonably to conclude in light of his experience that criminal activity may be afoot."[255] It was only in Justice Harlan's concurring opinion in *Sibron* that the "reasonable suspicion" standard was articulated.[256] In applying this diluted-cause standard, the Warren Court claimed the need to distinguish facts and circumstances from inarticulate hunches,[257] but failed to do so when they

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[255] *Terry*, 392 U.S. at 30.

[256] Sibron v. New York, 392 U.S. 40 (1967).

> The Court is of course entirely correct in concluding that we should not pass upon the constitutionality of the New York stop-and-frisk law 'on its face.' The statute is certainly not unconstitutional on its face: that is, it does not plainly purport to authorize unconstitutional activities by policemen. Nor is it 'constitutional on its face' if that expression means that any action now or later thought to fall within the terms of the statute is, ipso facto, within constitutional limits as well. No statute, state or federal, receives any such imprimatur from this Court.
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> This does not mean, however, that the statute should be ignored here. The State of New York has made a deliberate effort to deal with the complex problem of on-the-street police work. Without giving carte blanche to any particular verbal formulation, we should, I think, where relevant, indicate the extent to which that effort has been constitutionally successful. The core of the New York statute is the permission to stop any person reasonably suspected of crime. Under the decision in *Terry* a right to stop may indeed be premised on reasonable suspicion and does not require probable cause, and hence the New York formulation is to that extent constitutional.

Id. at 71 (Harlan, J., concurring).

[257] *Terry*, 392 U.S. 21-22.

> And in justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief

validated the stop of Terry and Chilton based on Officer McFadden's statements that the two "didn't look right"[258] and that McFadden "just didn't like 'em."[259] Thus, the current standard for a stop was forever grounded upon the very type of inarticulate hunch that the Court said was an insufficient basis for a *Terry* stop.[260] From the outset, the *Terry* "reasonable suspicion" test exhibited the form of a standard devoid of any real substance. Consequently, later courts relying on this standard mired in vagary have further weakened "reasonable suspicion" to uphold stops based on nothing or very little more than race or socioeconomic status. These later cases are totally consistent with the result in *Terry*, if not the *Terry* Court's sentiment of bringing such conduct within the ambit of the Fourth Amendment.

The suspects had moved away from the street where Officer McFadden had observed the men looking in a store window and where he thought the robbery would take place.[261] The Supreme Court, however, rejected this fact as being critical, essentially concluding that the men had not abandoned the intent to commit a crime, something the Court, of course, could not have known.[262] When the men left Huron Road and

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> that the action taken was appropriate? Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.

Id. (citations and footnotes omitted).

[258] Transcript, *supra* note 30, at 1456.

[259] Louis Stokes, *Representing John W. Terry*, 72 ST. JOHN'S L. REV. 727, 730 (1998).

[260] *See* Laser, *supra* note 113.

> As the Court articulated in *United States v. Cortez*, the *Terry* standard is not self-evident in practice: "Terms like 'articulable reasons' and 'founded suspicion' are not self-defining; they fall short of providing clear guidance dispositive of the myriad factual situations that arise."
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> . . . .
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> Since *Cortez*, courts have interpreted the 'totality of the circumstances' broadly, thus expanding the scope of what constitutes an acceptable *Terry* stop. In the drug-trafficking context, for example, the Court has held that police officers can conduct *Terry* stops even when the 'totality of the circumstances' is nothing more than a set of innocent behaviors.

Id. at 1169 (footnotes omitted).

[261] *Terry*, 392 U.S. at 5.

[262] *Id.* at 28 ("Although the trio had departed the original scene, there was

turned the corner on to Euclid Avenue, nothing about their behavior would continue to sustain a reasonable belief that they were about to commit a crime.

It was never clear exactly what the Court was upholding and what level of cause needed to be met, other than something less than probable cause. Nor did the companion cases—*Sibron v. New York*[263] and *Peters v. New York*[264]—add much clarification. In *Sibron*, again, the Court focused on the search for weapons, finding it unsupportable because the officer's statement before the search for weapons "made it abundantly clear that he sought narcotics," not a weapon.[265] In *Peters*, the Court refused to rule on the constitutionality of the New York statute, which authorized police to stop people and search for dangerous weapons on "reasonable suspicion," by finding that the search was incident to a lawful arrest for burglary based upon probable cause.[266]

The reasonable suspicion standard became firmly established a decade after *Terry*, in *Brown v. Texas,* when the Court held that a police officer's claim that a man "looked suspicious" without accompanying facts which supported that conclusion was insufficient to meet the reasonable suspicion standard.[267]

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nothing to indicate abandonment of an intent to commit a robbery at some point."); *see, e.g.,* State v. Cyr, 501 A.2d 1303 (Me. 1985). An officer saw a car parked in the parking lot of a furniture store. *Cyr*, 501 A.2d at 1306. The officer knew that the store had recently been burglarized, but chose not to approach defendant. *Id.* The defendant drove away from the store, and the officer followed, eventually electing to stop the car. *Id.* at 1305. The defendant was charged with operating a motor vehicle without a license. *Id.* Even though defendant left the suspicious scene, and was never shown to have any intent to burglarize the store, the court held that "[g]iven the location of the truck, the time of night, and the other surrounding circumstance, we conclude that specific and articulable facts existed to justify the minimal intrusion involved in stopping the vehicle." *Id.* at 1306.

[263] Sibron v. New York, 392 U.S. 40 (1967) (consolidated with Peters v. New York).

[264] Peters v. New York, 392 U.S. 40 (1968) (consolidated with Sibron v. New York).

[265] *Sibron*, 392 U.S. 64 (consolidated with Peters v. New York).

[266] *Peters* v. New York, 392 U.S. at 66 (consolidated with Sibron v. New York); *see also* N.Y. CODE CRIM. PRO., ch. 86, § 180-a (1964) (current version at N.Y. CODE CRIM. PROC. § 140.50 (McKinney 2004)).

[267] Brown v. Texas, 443 U.S. 47, 52 (1979).

Thus, Justice Harlan's approach to the issue in *Terry* and development of the reasonable suspicion standard took hold and became the standard which we still use thirty five years later.[268]

The *Terry* doctrine, as applied in *Terry* and in subsequent cases, has deprived persons in inner-city minority communities of basic Fourth Amendment guarantees. Overwhelmingly, young black men are the subjects of *Terry* stops and the formulation and maturation of the reasonable suspicion standard made that impact inevitable.[269]

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[268] *Terry*, 392 U.S. at 131-34 (Harlan, J., concurring). The only part of the Harlan approach which has not become law was his view that once an officer has reasonable suspicion to forcibly stop a suspect, the right to conduct a limited search for weapons should flow automatically from the right to stop. *Id.* Instead, the Court has maintained that the stop and the frisk are two separate inquiries, although the right to search for weapons has been treated as almost automatic in some lower courts, especially in drug cases. *See, e.g.*, United States v. Sakyi, 160 F.3d 164, 169 (4th Cir. 1998) (adopting a per se rule allowing a *Terry* frisk following a stop supported by reasonable suspicion of drugs: "The indisputable nexus between drugs and guns presumptively creates a reasonable suspicion of danger to the officer.").

[269] *Cf.* Robert V. Ward, *Consenting to a Search and Seizure in Poor and Minority Neighborhoods: No Place for a "Reasonable Person,"* 36 HOW. L.J. 239 (1993).

> While the Justices in *Terry* were conscious of the problems between African Americans and police officers, they failed to provide adequate safeguards to ensure that the relations between police and the African American community would be considered when determining whether a reasonable person would feel free to deny consent to a search and seizure. The Court was presented with the opportunity to affirmatively incorporate the long history of police oppression into its formula to determine voluntary consent to a search and seizure. Instead, the Supreme Court chose not to do so, thus, perpetuating the social wrongs it knew occurred almost daily.
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> In decisions following *Terry*, the Supreme Court has continued to ignore the historical relationship between minority communities and the police.

Id. at 248-49 (footnotes omitted); *cf.* Harris, *supra* note 29.

> A substantial body of law now allows police officers to stop an individual based on just two factors: presence in an area of high crime activity, and evasive behavior. In other words, many courts now find that reasonable suspicion to stop exists when the person involved 1) is in a crime-prone location, and 2) moves away from the police.
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> Even if this does not seem remarkable in the abstract, these "location plus evasion" cases become distressing when viewed in conjunction

In the years since *Terry*, the standard of reasonable suspicion has become more problematic by the emphasis upon two factors. The first is the officer's experience. In *Terry*, the Court said that Officer McFadden's conclusion that criminal activity was afoot was reasonable "in light of his experience."[270] However, Chief Justice Warren failed to elaborate on the relevant experience. Officer McFadden, an expert at identifying shoplifters and pickpockets, testified that he had never apprehended a robber.[271]

Terry involved reliance on a police officer's judgment based on experience on the street. That judgment must withstand an objective evaluation, but by necessity it represented a vote of confidence in a police officer's ability to discern impending criminal behavior even though the facts are insufficient to form the probable cause necessary for an arrest. When reviewing a police officer's conclusion of impending criminal activity, a court must review the evidence along with inferences and deductions drawn by a trained law enforcement officer, "inferences and deductions that might well elude an untrained person."[272] Those facts and circumstances, along with the infer-

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with a related fact: These stops and frisks are applied disproportionately to the poor, to African Americans, and to Hispanic Americans. This is because these individuals are most likely to live in so-called high crime areas, and to have reason to avoid the police. Police use *Terry* stops often in crime-prone areas, making people in those areas recurrent targets, when residents react by attempting to avoid the police, "location plus evasion" cases supply a ready-made basis from more *Terry* stops. This begins and perpetuates a cycle of mistrust and suspicion, a feeling that law enforcement harasses African Americans and Hispanic Americans with *Terry* stops as a way of controlling their communities. Thus "location plus evasion" cases bring into sharp focus the idea of fairness in society in general, and in the criminal justice system in particular. At a time when racial bias in the justice system is a difficult an issue as ever, "location plus evasion" cases strengthen the impression that this country has two justice systems: one for whites and one for minorities.

Id. at 660 (footnotes omitted).

[270] *Terry*, 392 U.S. at 30.

[271] Transcript, *supra* note 30, at 1420.

[272] United States v. Cortez, 449 U.S. 411, 418 (1981); see also United States v. Arvizu, 534 U.S. 266 (2002).

Stoddard was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's

ences and deductions "understood by those versed in the field of law enforcement . . . must raise a suspicion that the particular individual being stopped is engaged in wrongdoing."[273] The Supreme Court added in *United States v. Arvizu*, that "[t]his process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'"[274] Giving weight to a law enforcement officer's assessment of an ongoing street situation is a fair tool to incorporate into the determination of the reasonableness of the decision to stop and question a suspect. However, it must not become a substitute for a court's independent evaluation of the reasonableness of the officer's decision and should not serve as a basis for rubber stamping the officer's conclusion.[275] When it serves as a rubber stamp for

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inhabitants.

. . . .

. . . The likelihood that respondent and his family were on a picnic outing was diminished by the fact that the minivan had turned away from the known recreational areas accessible to the east on Rucker Canyon Road. Corroborating this inference was the fact that recreational areas farther to the north would have been easier to reach by taking 191, as opposed to the 40-to-50-mile trip on unpaved and primitive roads. The children's elevated knees suggested the existence of concealed cargo in the passenger compartment. Finally, for the reasons we have given, Stoddard's assessment of respondent's reactions upon seeing him and the children's mechanical-like waving, which continued for a full four to five minutes were entitled to some weight.

Arvizu, 534 U.S. at 276-77.

[273] United States v. Cortez, 449 U.S. 411, 418 (1981). *But see* Toledo v. Penn, 109 Ohio Misc. 2d 1, 5 (Mun. Ct. 2000) ("Activity that merely piques the curiosity of a police officer will not suffice.").

[274] *Arvizu*, 534 U.S. at 273.

[275] *See* Harris, *supra* note 29.

[T]he Court's recent *Terry* cases show what *Terry* only hinted at: The reasonable suspicion standard does not require much evidence to allow an officer to make a Fourth Amendment seizure. Further, the answer to the question "How much is enough?" has shifted, slowly but inexorably, to the point that a few innocent activities grouped together, *or even no suspicious activities at all*, can be enough. The Court wants police judgment in these matters respected; deference is the rule. The police are to be given wide latitude to operate as they see fit.

Id. at 669.

the officer's conclusions, it vests unlimited discretion in the officer on the street, discretion which the Court has sought to limit in other Fourth Amendment contexts.

The second problematic factor is the weight given to the locale where the stop takes place. The Supreme Court has made it clear that the neighborhood where a suspect is found is not enough, alone, to justify an investigatory stop.[276] In *Brown v. Texas*, the Court said that "[appellant's being] in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct."[277]

Nonetheless, the Supreme Court has used locale as an appropriate element in the *Terry* equation, and in one of the earliest stop and frisk cases, *Adams v. Williams*, it appeared to be the critical component.[278] In *Illinois v. Wardlow*, Chief Justice Rehnquist wrote that "[a]n individual's presence" in a high crime area "standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime" but immediately undermined that statement:

> But officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. Accordingly, we have previously noted the fact that the stop occurred in a "high crime area" among the relevant contextual considerations in a *Terry* analysis.[279]

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[276] Subsequent courts have been as inconsistent as the Supreme Court on this issue. *See, e.g.*, United States v. Burton, 334 F.3d 514 (6th Cir. 2003), *cert. denied*, 540 U.S. 1135 (2004). An officer received a tip that two black men were selling drugs. *Burton*, 334 F.3d at 515. He saw two black men in a car, stopped the vehicle for being illegally parked, and questioned the men about narcotics. *Id.* The court held that "where, as here, the traffic stop took place on a street known to the police as a high-crime area, we believe that asking a few questions about illegal activity to the driver of an automobile stopped for a traffic violation at 11:30 p.m. is not unreasonable." *Id.* at 519. *But see* United States v. Lawson, No. 92-3214, 1994 WL 9944 (D.C. Cir. Jan. 3, 1994). Police officers surrounded a man in a wheelchair based on an anonymous tip and the fact that defendant was in a high crime neighborhood. *Id.* at *1. The court found "these two factors alone insufficient to justify the stop." *Id.* at *10.

[277] Brown v. Texas, 443 U.S. 47, 52 (1979).

[278] Adams v. Williams, 407 U.S. 143 (1972).

[279] Illinois v. Wardlow, 528 U.S. 119, 124 (2000). (citations omitted).

And the Supreme Court in *Maryland v. Buie*, while indicating that "[e]ven in high crime areas where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted[,]"[280] did indicate the importance of such a locale in the reasonable suspicion analysis.[281] The clear message is that in "high crime" or "high drug activity" areas, i.e. the inner city, the possibility of criminal activity is so substantial as to make everyone in the area subject to police inquiry.

Consequently, lower courts give enormous weight to this collateral factor, often requiring little more than some other innocuous bits of information to fulfill the reasonable suspicion requirement justifying a stop. Thus, "high crime area" becomes a centerpiece of the *Terry* analysis, serving almost as a talismanic signal justifying investigative stops. Location in America, in this context, is a proxy for race or ethnicity.[282] By sanctioning investigative stops on little more than the area in which the stop takes place, the phrase "high crime area" has the effect of criminalizing race. It is as though a black man standing on a street corner or sitting in a legally parked car has become the equivalent to "driving while black" for motor-

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[280] Maryland v. Buie, 494 U.S. 325, 334 n.2 (1990).

[281] *Buie*, 494 U.S. at 334.

[282] *See Wardlow*, 528 U.S. at 132 nn.7-8.

> [M]any minorities [believe] that field interrogations are conducted "indiscriminately" and "in an abusive . . . manner" and label[] this phenomenon a "principal problem" causing "friction" between minorities and the police.
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> . . . .
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> Many stops never lead to an arrest, which further exacerbates the perceptions of discrimination felt by racial minorities and people living in high crime areas.

Id. at 132-33 nn.7-8 (Stevens, J., dissenting) (citations omitted); *cf.* Florida v. Bostick, 501 U.S. 429, 442 n.1 (1991) (Marshall, J., dissenting) (stating that stops are not random and that race is a factor in determining who is stopped); United States v. Sokolow, 490 U.S. 1 (1989).

> By requiring reasonable suspicion as a prerequisite to such seizures, the Fourth Amendment protects innocent persons from being subjected to "overbearing or harassing" police conduct carried out solely on the basis of imprecise stereotypes of what criminals look like, or on the basis of irrelevant personal characteristics such as race.

Sokolow, 490 U.S. at 12 (Marshall, J., dissenting) (citations omitted).

ists.[283]

One of the best illustrations of both points, substituting a police officer's expertise for an objective evaluation and substituting locale for facts, is an Ohio case, *State v. Bobo*,[284] where three officers from the Cleveland Police Department Narcotics Unit, "in an unmarked police car, were investigating an area of the city known for heavy drug activity."[285] The officers "noticed a car with two occupants legally parked on the street near an open field."[286] The officers circled the block and returned to the parked vehicle where, now, only one occupant of the car was visible.[287] One of the officers testified that Marvin Bobo popped up on the passenger's side of the front seat, looked at the police officers, and then disappeared once again "as if to hide something under the front seat."[288] The officers approached Bobo's vehicle on foot, asked him to step out, and conducted a search.[289] The officers found a weapon under the front seat.[290] Bobo was arrested and charged with two weapons offenses.[291] No drugs were found on Bobo, his companion, or in the car.[292] Bobo's motion to suppress the gun and the police officers' testimony about the gun was denied by the trial court, which then found the defendant guilty.[293] The court of appeals reversed the conviction on the ground that the investigative stop was illegal because "'there were not articulable facts to justify the officers' reasonable suspicion that . . . [Bobo] was engaged in criminal activity.'"[294]

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[283] State v. Ward, 610 N.E.2d 579, 582 (Ohio Ct. App. 1992) (Harper J., dissenting) ("The majority of this court today, as has been the recent trend in this court, is actually holding that, as a matter of law, those unfortunate black, Hispanic and poor white citizens who by virtue of their economic and social status live in so-called 'high crime areas' are suspects.") (citations omitted).

[284] 524 N.E.2d 489 (Ohio 1988).

[285] *Bobo*, 524 N.E.2d at 490.

[286] *Id.*

[287] *Id.*

[288] *Id.*

[289] *Id.*

[290] *Id.*

[291] *Id.*

[292] *Id.*

[293] *Id.*

[294] *Id.*

The Ohio Supreme Court disagreed and reversed the appellate court, finding that the stop was reasonable.[295] The court's conclusion in *Bobo* rested on four factors: 1) "the area in which Bobo was parked was an area noted for the number of drug transactions which occurred there"; 2) "the stop was made at approximately 11:20 p.m."; 3) "the circumstances surrounding the stop must 'be viewed through the eyes of a reasonable and cautious police officer on the scene, guided by his experience and training'"; and 4) "the officers' observation of Bobo popping up and then ducking down or leaning forward."[296] It is instructive to note that the state argued that the arresting officer's twenty years of experience "and numerous years in the surveillance of drug and weapon activity" should weigh heavily in the assessment of the facts.[297] After all, we are told that the officer knew how drug transactions went down and knew how to assess a suspect's "gesture . . . in ducking under his seat."[298] Notice was not taken that the usual drug transaction is quick; the buyer and seller do not linger.[299] The officers did not see any other persons walking up to the car.[300] Moreover, the officers were not in a police car. Persons parked in a high drug area who see a vehicle with three men observing their parked car coming around the block again and stopping behind the parked car might well be frightened and prompted to move around perhaps in preparation for pulling away from the curb if they feel further threatened.

Bobo is indicative of how stops in the inner city are viewed by reviewing courts. The critical factors cited by the court were the area where Bobo was parked, the time of day, and the experience of the officers; everything else was terribly ambiguous. Arguably, area and time of day are not meant to be the foundation upon which a stop is made. Yet *Bobo* stands for the proposition that every person coming and going at night on an urban street in a "high crime" or "high drug activity" locale is

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[295] *Id.*
[296] *Id.* at 491-92.
[297] *Id.* at 491.
[298] *Id.* at 490.
[299] *Id.*
[300] *Id.*

subject to being stopped, questioned, and possibly searched.[301] Although *Terry* held that an officer's experience requires her to draw inferences from facts, not to draw conclusions from nothing, in *Bobo* it was merely a ubiquitous claim of furtive gestures that sealed the case.[302] Such outcomes could not have

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[301] *See, e.g.,* United States v. Edmonds, 240 F.3d 55 (D.C. Cir. 2001). An officer with 14 years of experience working in the neighborhood approached a defendant because his car was parked in a school zone. *Edmonds*, 240 F.3d at 57. His suspicion was based on location since the area was notorious for drug activity. *Id.* He approached the defendant, asked him for identification and to step out of the car. *Id.* The defendant fled the scene. *Id.* The court held that defendant was seized when the officer asked him for identification, but held that the seizure was reasonable based on the officer's experience and location of the defendant's vehicle. *Id.* at 64. *But see* Commonwealth v. Bacon, 411 N.E.2d 772 (Mass. 1980). The officers stopped two young men driving a Cadillac at 4:10 A.M. *Bacon*, 411 N.E.2d at 773. When the young men observed the officers, one raised his hand as if to hide his face. *Id.* The court held that "two youthful appearing men were operating a relatively expensive (but four year old) motor vehicle at 4:10 A.M. on a Saturday morning on Washington Street in Boston does not alone warrant a reasonable suspicion of criminal activity that would justify a police investigatory stop." *Id.* at 775 (footnotes omitted). The court went on to say that while concealing one's face may be a factor as to the reasonableness of a stop in some cases, it did not give the officer's reasonable suspicion in this case. *Id.*

[302] *See* State v. Bobo, 524 N.E.2d 489, 495 n.2 (Ohio 1988) (Wright, J., dissenting).

> The following exchange took place between defense counsel and [Officer] Mandzak:
> "Q. So that the best you can say is that you saw someone bend down; am I correct?
> "A. At what point?
> "Q. Wouldn't you say you saw him make this motion?
> "A. Yes.
> "Q. You don't know what his hands did, do you?
> "A. It looked like he was putting something underneath the seat.
> "Q. Were you able to see his hands?
> "A. No.
> "Q. So you don't know if he made a hand movement or not, do you?
> "A. I don't know what he did. It looked like he was putting something under his seat.
> "Q. You don't know that, do you?
> "A. I was suspicious of it.
> "Q. The best you could tell, all he could have been doing is bending down and his hand not go below the seat?
> "A. It is possible.
> "Q. You don't know if his hand was even outstretched, do you?
> "A. It looked like he was bending down.
> "Q. You don't know if his hand was outstretched, do you?

been the intent of the Court in *Terry*, but have become reality. There was no drug deal in Bobo's car that night. The person parked in the car with Bobo was a woman, and "[t]he facts in this case indicate that, if anything, a romantic tryst, not a drug deal or any other illegal activity, was occurring in the car."[303] While these facts resulted in imprisonment of a guilty man in Bobo, similarly weak facts are responsible for the constant seizures of countless innocent citizens whose only "crime" is being poor, a minority, or in a high crime neighborhood. This deplorable repercussion stems from the striking failures of *Terry* and its progeny.

CONCLUSION

The *Terry* Court said that while expanding police power by recognizing investigative stops on less than probable cause, it intended to harness that power and bring it under the reasonableness command of the Fourth Amendment. The effect, however, has been the expansion of police authority that has yet to be tempered by the Fourth Amendment, especially in urban locations where the courts tend to focus more on the location than on the particular facts of the case. After more than thirty-five years of experience with the *Terry* rules, it is time to reintroduce the Fourth Amendment on to the streets of America and into the relationships that law enforcement officers have with people on the streets and in other venues.[304]

"A. How do you mean outstretched?
"Q. In this fashion, in front of him?
"A. I couldn't see his hands.
"Q. Could you see his arms?
"A. I saw the back part of his body.
"Q. Could you see his arm?
"A. No."

Id.

[303] *Bobo*, 524 N.E.2d at 494-95 (Wright, J., dissenting); *see id.* at 495 n.3 ("The female occupant testified that she and appellee went out to dinner and then they parked on the street. It appears they were parked for more than an hour before the police arrived. In addition, [Officer] Mandzak testified that when he looked into the car, 'she [the female occupant] was fastening her clothing.'").

[304] The fact that the Amendment was designed as a limit on governmental powers is a reality that has been lost on the Court. *Compare* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201

There is a need to redefine the Fourth Amendment term "seizure" by assuming that a person has been seized by a law enforcement officer if the officer does not inform the subject at the initiation of the encounter that the subject is free to disregard the request/command. This approach involves abandoning the fiction that the reasonable person when confronted by a police officer feels free to walk away or refuse to cooperate. People do not believe they can simply disregard a police request. That belief is the natural result of the manner in which

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(1993) (arguing that the present Supreme Court "has ignored or distorted the history of the Fourth Amendment" and that "the central meaning of the Fourth Amendment is distrust of police power and discretion") (footnotes omitted) *with* Sundby, *supra* note 112.

> *Camara* and *Terry* constituted innovative departures from a fourth amendment mentality that had restricted the amendment's coverage in the name of maintaining the warrant clause's rigorous protections. In this sense the Court's willingness in *Camara* and *Terry* to face the unique fourth amendment problems posed by government activities like housing inspections and stop and frisks is admirable. Two decades later, however, it has become evident that those decisions came at a price. The combined effect of *Camara* and *Terry* is the major reason the Court has failed to meet the first challenge of defining a rational relationship between the warrant and reasonableness clauses that fulfills the amendment's purposes.
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> . . . .
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> . . . The Court in *Camara* and *Terry* embraced the reasonableness balancing test in a manner that conceptually weakened probable cause and failed to provide any long-term guidance or limits for the future role of reasonableness.

Id. at 398-99; *and* Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen*, 94 COLUM. L. REV. 1751 (1994), *with* Harris, *supra* note 81.

> But it is also worth noting that *Terry* takes the law of search and seizure as it applied to street encounters some distance back in the direction of pre-*Mapp* law, to the time that police officers ruled the streets on simple gut instinct that told them whether a person was "dirty." If *Mapp* meant officers could no longer ignore the Fourth Amendment because of the newly-imposed requirement of probable cause, *Terry* returned a significant portion of discretion to the police, increasing their power to interfere with a citizen's "right of locomotion" and to conduct searches. To be sure, *Terry* required that police have an articulable reason for their conduct, rather than having total discretion. But the conclusion is inescapable that in *Terry* the police won back a significant part of the power they needed to conduct business according to pre-*Mapp* standards.

Id. at 985 (footnotes omitted).

an officer's request is communicated, often cloaked in the form of a command. There is only one way to assure that the reasonable person would feel free to disregard the request/command and that is to have the officer inform the subject of the choice.[305] Although the United States Supreme Court is loathe to impose such requirements upon the police except in the most "inherently coercive" situations, it is that Court's willingness to engage in the fiction that has created the problem. The only

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[305] *Compare* Butterfloss, *supra* note 185, at 442 (proposing "that the *Mendenhall-Royer* standard, as presently interpreted, should be discarded because it is unworkable and fails to strike the appropriate balance between the liberty interests of the citizen and the interest of the state in combating crime. . . . The test should be replaced by a per se rule . . . ."), *with* Anderson, *supra* note 146,

> [The only alternative way to fix the balance that has been tilted heavily in favor of the police] may be to resort to locally heightened and sanctioned police review. This will require citizens to carefully consider policies and approaches that may be used to monitor the actions of local police. The reliance on judicial controls has proven to be a mistake because such reliance is inefficient. That is not to say that sound jurisprudence that protects the rights of the accused is still not required, it simply cannot be relied on as the primary tool for enforcing police accountability.

Id. at 750; *and* Ronald J. Bacigal, *Putting the People Back into the Fourth Amendment*, 62 GEO. WASH. L. REV. 359 (1994).

> Finally, in considering what the [Fourth] amendment ought to mean, we must afford legislators and administrators an opportunity to play their role in Fourth Amendment decision making. Historically, legislators and administrators have been minor players in search-and-seizure jurisprudence, but they have the potential to be the greatest heroes of the Fourth Amendment's morality tale because they are best situated to protect the people by regulating and controlling law enforcement officials- the actors who most directly impact on citizens' Fourth Amendment interests. Should legislators or administrators fail to live up to their potential, they can be educated, prodded, or removed from office by the people.
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> By integrating juries, judges, legislators, and administrators into the Fourth Amendment's decisionmaking structure, we stimulate the ideal of participatory political decision making under our republican form of government. In the continuing struggle between individual autonomy and collective security, we the people must "find a way to talk about an irreconcilable clash of interests that does some real justice to claims on both sides." This dialogue cannot be left to the organs of the state because the judiciary is not us; the legislature is not us; the executive is not us. By putting the people back into the Fourth Amendment via their participation in jury determination of search-and-seizure law, we empower the people as an important force of social definition and cohesion.

Id. at 431.

way to overcome the present situation is to impose a requirement that absence such warning, there is a seizure of the person which must meet the reasonableness standard.

There also is a need to reshape the reasonable suspicion standard to elevate the suspect's conduct above ancillary factors. The locale of a stop, which is often a proxy for race, should not be a substitute for suspicious behavior on the part of the suspect. Moreover, the inferences that a court credits to a trained law enforcement officer should be inferences drawn from actual facts and suspicious conduct, not inferences heaped on top of inferences often originating, again, in race. Obviously, reasonable suspicion is a lesser standard than probable cause, but it still demands a conclusion drawn from actual conduct instead of just race, location, and time of day, in other words, not thin air. A more rigorous analysis of reasonable suspicion requires only that the auxiliary factors—location, time of day, and an officer's intuition—be treated as supplemental instead of a substitute for facts and circumstances in the reasonable suspicion equation.

PROTECTING THE CITIZEN "WHILST HE IS QUIET": SUSPICIONLESS SEARCHES, "SPECIAL NEEDS" AND GENERAL WARRANTS

Scott E. Sundby[*]

I. INTRODUCTION

Certain government searches are likely to get anyone's Fourth Amendment adrenalin pumping: political leaders using government agents to ferret out dissidents and silence their criticisms; the police battering down an innocent citizen's door based upon only the flimsiest of tips; officers indiscriminately rounding up citizens for questioning merely because their race matches a victim's vague description; the soccer mom dragged off in handcuffs by an overzealous cop for an offense that at most could result in a fine.[1] These are classic government-citizen encounters that raise our Fourth Amendment ire because they touch a deep republican chord in the American conscience and harken back to the colonists' struggles against oppression and overreaching government officials. Moreover, these moments are easily visualized as if they were an episode of COPS. We can feel a rush of angry indignation if we imagine ourselves being pushed into the back of a police cruiser as our toddlers look on, or we can sense the dread of those who have opposed tyrants over the centuries and heard the heavy footsteps down the hallway foretelling of the "midnight knock" of government agents.

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[1] Although many find this last example alarming, the Supreme Court found it constitutional in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

What are often labeled "regulatory" or "administrative" or "special needs" searches, on the other hand, are far less likely to rally the citizenry to the Fourth Amendment barricades. These searches would be more the material of a show called CLERKS rather than COPS, as the citizen hands over a urine sample to the employee of a drug testing firm or opens the door to a thickly bespectacled housing inspector wanting to check for faulty wiring. Moreover, such searches often are instituted in the name of a powerful public good, such as regaining control of our nation's schools from the grip of drugs or protecting innocent babies from being born addicted to crack.

Compared to administrative searches, "checkpoints" that require an individual to submit to someone in a police uniform are more likely to excite Fourth Amendment sensibilities, but they still are unlikely to cause much public uproar. They tend to be brief encounters that, at least in theory, apply to everyone, sparing the individual the indignation of being singled out by the police as a wrongdoer. And like administrative searches, the image of a checkpoint tends to not have much imaginative or visual punch as the line of cars wends its way through a sobriety or immigration roadblock. By contrast, the public good that the checkpoint is trying to accomplish—removing drunken drivers from the roads or catching drug pushers—immediately resonates as desirable.

For those who believe that administrative searches and checkpoints are constitutionally worrisome, therefore, the difficulty is to explain why, even if these types of searches might not make good reality television, something important is at stake. The Court's explanation traditionally has been primarily rooted in the idea of privacy. In *Camara v. Municipal Court of San Francisco*,[2] when the Court first brought administrative searches within the Fourth Amendment fold by holding that housing inspections were subject to the Amendment, the majority explained that while a housing inspection might not be a "hostile intrusion," the individual still "has a very tangible interest in limiting the circumstances

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[2] 387 U.S. 523 (1967).

under which the sanctity of his home may be broken by official authority . . . ."[3]

Given the context of *Camara*, the Court's use of privacy as the core rationale for assessing administrative searches made sense. Because the Court had previously found that housing inspections were only at the peripherary of the Amendment,[4] the *Camara* Court needed a means of bringing the inspections more fully within the Amendment's protections. The idea of protecting the "sanctity of the home" provided such a means because the inspections required entering an individual's house even if the inspector was only looking for faulty wiring.[5] Moreover, the Court that same term in *Katz v. United States*[6] was in the process of making "reasonable expectations of privacy" the centerpiece of the Amendment's protections.[7] Consequently, the now familiar *Camara* formula of "flexible probable cause" as requiring the weighing of the government's need for the intrusion against the severity of the intrusion on the individual's privacy interest made logical sense.[8] Privacy soon became the Fourth Amendment gold standard in discussing the constitutionality of inspections, regulatory searches and checkpoints.

But while privacy might have provided a substantial counterweight in the context of an intrusion inside the home, it proved to be much more of a makeweight when the Court addressed inspections and regulatory searches in other settings. A brief stop at a checkpoint might impinge upon one's privacy, but the impingement simply is not of the magnitude of an agent of the government entering one's home, even if the agent is only a housing inspector wearing a pocket protector

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[3] *Camara*, 387 U.S. at 530-31.

[4] *See* Frank v. Maryland, 359 U.S. 360, 367 (1959).

[5] *Camara*, 387 U.S. at 531 (noting also that housing inspections were enforced by criminal processes).

[6] 389 U.S. 347 (1967).

[7] *Katz*, 389 U.S. at 362 (Harlan, J., concurring).

[8] *Camara*, 387 U.S. at 536-37. This is not to say that the *Camara* formulation properly calibrated the scales when it came to determining how the government's interest should be weighed against the individual's privacy interest. *See generally* Scott E. Sundby, *A Return to Fourth Amendment Basics: Undoing The Mischief of* Camara *and* Terry, 72 MINN. L. REV. 383 (1988).

and armed with a clipboard. A dialogue centered on privacy might seem more relevant when the "search" involves urine samples because of the great privacy we want when we perform our bodily functions, but the usefulness of privacy for defining the Fourth Amendment stakes becomes far less helpful if the sample is given without observation. As the Court's cases involving random urine testing illustrate, the privacy imagery then becomes more of providing a urine sample at the doctor's office to check on one's health than of the police entering one's front door.[9]

If regulatory searches and checkpoints are thought of primarily in terms of physical privacy, therefore, they often appear as essentially *de minimis* constitutional violations, especially when conducted outside of the home. One might attempt to overcome this *de minimis* appearance by using an analogy to the Court's reasoning in *Wickard v. Filburn*[10] where it was held that a single farmer's use of wheat affected interstate commerce.[11] An argument could be made, for example, that just like the effect of the consumption of wheat by a single farmer from his field must be thought of as multiplied by thousands of farmers harvesting wheat from their fields, the privacy interest at stake with one sample of urine must also be thought of in the aggregate of thousands being forced to give urine samples. But not only is the image of multiplying urine samples somewhat disconcerting, it does not really do much to raise the public's Fourth Amendment dander.

Yet clearly some Fourth Amendment instinct is at play in these cases. Not only have cases involving checkpoints and drug testing commanded the Supreme Court's attention, they often have provoked strongly worded opinions. Justice Scalia, for example, direly warned when the Court upheld suspicionless drug testing of Customs Service employees that "[t]hose who lose because of the lack of understanding that

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[9] *See generally* Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751 (1994).

[10] 317 U.S. 111 (1942).

[11] *Wickard*, 317 U.S. at 127-28 (holding that while a single farmer's use of wheat may be insignificant, if "taken together with that of many others similarly situated, [it] is far from trivial").

begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content . . . ."[12]

But if the language of privacy does not adequately capture the values that are in jeopardy through suspicionless searches and checkpoints, how might we better frame the issues to address what is at stake? Various alternative ways of thinking about the Fourth Amendment have been proposed. For example, it is argued that we ought to recast our analysis to account for the role of trust between the citizen and government,[13] to focus on the importance of individual respect,[14] or to see police coercion as the primary problem under the Fourth Amendment in today's world.[15] While these differing formulations offer fruitful insights, the Supreme Court itself, in two fairly recent opinions, may have offered the analytical stepping stone to how these types of searches might best be looked at under the Fourth Amendment. Without specifically mentioning general warrants, the Court's decisions in *City of Indianapolis v. Edmond*[16] and *Ferguson v. City of Charleston*[17] raise themes that directly cast back to the concern over general warrants that served as the impetus for the Fourth Amendment. It may be that this historical concern provides the key to dealing with modern phenomena like government drug testing and an expanding law enforcement presence with the capability of conducting widespread searches and checkpoints.

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[12] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 687 (1989) (Scalia, J., dissenting).

[13] *See generally* Sundby, *supra* note 9.

[14] *See generally* Andrew Taslitz, *Respect and the Fourth Amendment*, 94 J. CRIM. L. & CRIMINOLOGY 15 (2003).

[15] *See generally* William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).

[16] 531 U.S. 32 (2000).

[17] 532 U.S. 67 (2001).

II. SETTING THE STAGE FOR A REVIVAL OF THE GENERAL WARRANTS DOCTRINE

The general warrant and the excessive amount of discretion that it placed in the hands of the government agents conducting the search stands as the primary evil at which the Fourth Amendment was directed.[18] The Fourth Amendment's concerns with general warrants echo directly back to two famous English cases that addressed the legality of general warrants during the time when the United States was still a British colony. In the *Wilkes* case, the British Secretary of State, Lord Halifax, issued a warrant authorizing four messengers to search for the printers and publishers of the "seditious" publication *The North Briton*, No. 45.[19] Apart from lacking statutory authority, the warrant did not specify the places to be searched or identify the persons to be seized.[20] By the end of the search, more than twenty-four people had been arrested,[21] some with no connection to *The North Briton*, and "quantities" of private papers had been seized.[22] The English court found the warrant to be "hopelessly defective," with no "offenders' names" specified, no inventory of things taken away, and a broad discretion given to the messengers that was "totally subversive of the liberty of the subject."[23]

Afterwards, the *Entick* case was decided, in which Lord

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[18] *See generally* Thomas Y. Davies, *Recovering the Original Fourth Amendment*, 98 MICH. L. REV. 547 (1999).

[19] Wilkes v. Wood, 98 Eng. Rep. 489 (C.D. 1763).

[20] *Wilkes*, 98 Eng. Rep. at 498.

[21] In addition to Wilkes, who was the publisher of *The North Briton*, various other printers who had been arrested and later released when it appeared they had not printed Number 45 also sued, with juries returning "heavy verdicts" for the plaintiffs. TELFORD TAYLOR, *Search, Seizure, and Surveillance*, *in* TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 19, 30-31 (1969).

[22] *Id.* at 30.

[23] *Id.* at 31. After the jury returned a verdict for £1,000, the messengers took exception to the verdicts, which brought the cases before Lord Mansfiled, who affirmed the judgment on the narrow ground that the principle plaintiff, Dryden Leach, was in fact not the printer of the targeted publication, and therefore the warrant could not justify the trespass. *Id.* at 31-32. But in the course of arguments, Mansfield gave the opinion that the Halifax warrant was too "general" because no person was named or described in it. *Id.* at 32.

Halifax had issued a warrant "for arrest of the person and seizure of the books and papers of John Entick," who also was suspected of seditious writings.[24] Entick was arrested and his papers seized; after his release he sued the messengers in trespass, and the jury returned a verdict of £300.[25] On appeal, Lord Camden ruled in favor of Entick because the messengers failed to obey the directions of the warrant and because the statutory authority to search for libelous papers had expired.[26] In addition, Camden noted that the warrant in question was deficient because it "did not authorize merely the seizure of Entick's libellous papers, but all of them, libellous or not. Furthermore, the warrant had other flaws: no oath of probable cause had been given, and no record was made of what had been seized."[27]

Within the colonies, the *Wilkes* and *Entick* cases received attention both through English and colonial newspaper accounts and pamphlets that were written about the cases and circulated.[28] The colonies also were focused on general warrants because they faced their own form of general warrants through the writs of assistance that authorized customs officials to search for untaxed imported goods. The writs became the focus of James Otis' famous argument against the legality of writs of assistance in 1761.[29] Although Otis's argument failed and the issue of writs was reauthorized by the Townshend Act of 1767, the reauthorization itself sparked widespread discontent and gave rise to a number of legal challenges to the writs, with colonial judges often refusing to issue the writs as contrary to law.[30]

The concern with general warrants and writs of assistance

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[24] *Id.*

[25] Entick v. Carrington, 95 Eng. Rep. 807, 807-08 (C.B. 1765).

[26] TAYLOR, *supra* note 21, at 33. The directions called for the messengers to be accompanied by a constable and to bring Entick before Halifax himself, but the messengers failed to bring a constable with them and brought Entick before Halifax's assistant. *Id.*

[27] *Id.* at 33-34.

[28] Davies, *supra* note 18, at 563-65.

[29] For an excerpt of this argument, see *infra* note 183 and accompanying text.

[30] Davies, *supra* note 18, at 561-67. Otis's argument is discussed in more detail at *infra* notes 176-94 and accompanying text.

thus forms a rich historical backdrop to the Fourth Amendment's development and has continued to play an important role in shaping the ongoing debate over whether the "reasonableness" or the "warrant" clause should have primacy in interpreting how the Fourth Amendment should be applied. Those advocating that a general reasonableness standard should prevail have used the historical dislike of general warrants as one way of arguing that the Framers would have preferred warrantless searches over an approach that favors warrants. Supporters of the warrant-preference view, on the other hand, have drawn upon the abuses underlying the use of the general warrant—"searches conducted outside the judicial process, without prior approval by judge or magistrate"—to justify requiring the judicial issuance of warrants as the Fourth Amendment norm.[31] Although the Court recently has given increasing credence to the reasonableness approach,[32] the Court through most of the twentieth-century has used a warrant-preference approach and has relied upon the idea that the Framers preferred specific warrants because it curtailed the discretion of law enforcement agents to act without judicial approval: "[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[33]

But while the Framers' concern over general warrants has played and continues to play an important role in how we interpret the Fourth Amendment, as a day-to-day matter the colonial concern over general warrants has largely faded into the background. True, the Court occasionally will use the problem of general warrants to elucidate a particular aspect of the Fourth Amendment, such as what constitutes a "neutral or detached magistrate" or what is a sufficiently particularized search warrant. In *Lo-Ji Sales v New York*,[34] for instance, the

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[31] Katz v. United States, 389 U.S. 347, 357 (1967).

[32] *See generally* Sundby, *supra* note 9, at 1765-71.

[33] *Katz*, 389 U.S. at 357.

[34] 442 U.S. 319 (1999).

Court held a search that uncovered pornographic materials was unconstitutional because the town justice who issued the search warrant had stepped outside of his role as a "neutral and detached" judicial officer.[35] The Court justified its ruling by recognizing that the neutrality of the magistrate is critical to avoid moving towards general warrants, observing that "[o]ur society is better able to tolerate the admittedly pornographic business of petitioner than a return to the general warrant era . . . ."[36] In similar fashion, the Court made reference to the "hated" writs of assistance in *Stanford v. Texas*[37] when explaining its decision that a search warrant had not been sufficiently particularized because it was issued broadly "for the purpose of searching for and seizing any books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or any written instruments showing that a person or organization is violating or has violated any provision of" a statute specifically targeting the Communist Party of Texas.[38]

As a practical matter, though, and despite the rhetorical homage that the Court has paid to the role that the struggle against general warrants played in the formation of the Fourth Amendment, relatively few cases actually have run afoul of the prohibition against general warrants. The concern over general warrants for most of the twentieth century, therefore, has been to supply a theoretical and historical underpinning for the Supreme Court's warrant-preference approach; as a specific tool for enforcing the Fourth Amendment, however, its scope has been fairly limited. This was not because the aversion to general warrants had lessened, but simply because by making the warrant clause the first step in Fourth Amendment analysis, the Court had largely preempted the possibility of general warrants in the historical

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[35] *Lo-Ji Sales*, 442 U.S. at 326.

[36] *Id.* at 329.

[37] 379 U.S. 476 (1965).

[38] *Stanford*, 379 U.S. at 477. The state was not helped by the fact that in executing the warrant, the agents rounded up books "by such diverse writers as Karl Marx, Jean Paul Sartre, Theodore Draper, Fidel Castro, Earl Browder, Pope John XXIII, and MR. JUSTICE HUGO L. BLACK." *Id.* at 479-80.

sense. That is, because the prevailing norm was now that a government search required a judicially issued warrant particularized in its description, executive or legislatively authorized searches without judicial oversight were the exception rather than the rule. Consequently, the aversion to the abuses of general warrants had become more of an inspirational background value than a day-to-day tool for enforcing the Fourth Amendment.

Developments over the past several decades, however, may slowly have moved Fourth Amendment analysis to the point where the general warrants doctrine may soon be taken out of the "holy constitutional relics" category and given a far more active role in interpreting the Fourth Amendment. Several factors in particular have set the stage for a possible renaissance of the general warrants doctrine.

The first is the rise of technology that enabled the government to undertake widespread surveillance in a manner that simply was not possible before. Prior to the development of such technology, individualized suspicion not only made good Fourth Amendment sense, it also made good economic sense in that finite law enforcement resources were best allocated in pursuit of those about whom suspicion already existed. The 1980's, however, saw the advent of extensive drug testing in the workplace that soon spread over into the government sphere. The ability to quickly determine whether a group of individuals was taking drugs through a simple test allowed the government to learn information that before would have taken around-the-clock surveillance by a legion of law enforcement spies. Now that the government could gain the same information through laboratory testing of easily obtained samples, the capacity to engage in blanket testing rather than ferreting out offenders on an individual basis became far more feasible and tempting.

But while improved economic and technological feasibility made it possible to engage in these types of suspicionless intrusions, the government could not, of course, use these methods unless the Fourth Amendment was interpreted as allowing them. And, it has been the Court's gradual move towards a view that embraces the Reasonableness Clause as

the primary fulcrum for Fourth Amendment analysis that has made this allowance possible.

Considerable scholarly attention has been devoted to charting the Court's movement away from a warrant-preference model of the Fourth Amendment toward a conceptualization of the Fourth Amendment universe that has the Reasonableness Clause at its center. In particular, the movement gained momentum once the Court announced that if the government could show "special needs" other than crime detection, then suspicionless searches would be permissible if the government's justification outweighed the intrusion on the privacy interest. At a dizzying pace for the world of constitutional law, the Court in a six-year period between 1989 and 1995 used a reasonableness-based analysis to approve of suspicionless searches in a variety of settings, ranging from sobriety checkpoints to the drug testing of student-athletes.[39] It soon became a familiar Fourth Amendment sight to see courts finding "special needs" based upon safety or the nature of one's employment, pulling out the reasonableness balancing scales, and then placing the government's interest on one side and the individual's privacy interest on the other side.

Not surprisingly, the Court's growing receptivity to the idea that a search or seizure can be "reasonable" outside the traditional requirements of the Warrant Clause has had important ramifications. For our purposes of thinking about a rebirth of concern over general warrants, two side-effects are particularly significant.

First, because the generalized-reasonableness approach does not view probable cause as an essential prerequisite, the role of individualized suspicion lost some of its Fourth Amendment swagger. This effect is important because one of the virtues of requiring individualized suspicion is that it gives the citizen the power to control the government's ability to in-

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[39] *See* Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995); Mich. Dept. of State Police v. Sitz, 496 U.S. 444 (1990); Skinner v. Ry. Labor Executive Ass'n, 489 U.S. 602 (1989); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

trude. If a person does not act in a manner giving rise to probable cause (or reasonable suspicion for a *Terry* stop), the government has no discretion under the Fourth Amendment to engage in a search or seizure. Once suspicionless searches are recognized as a permissible subset of Fourth Amendment searches, however, the citizen can be subjected to intrusions simply for undertaking innocent activities such as wanting to play the trumpet in the school marching band[40] or applying for a government job.[41] The government's discretion, in other words, no longer is limited by the citizen's actions but can now extend to conducting intrusions so long as the government can show that its desire to intrude is "reasonable," a situation which begins to touch upon one of the underlying core concerns with general warrants—expansive government discretion in conducting searches.

The second side-effect was to alter the nature of the Court's decision-making role under the Fourth Amendment. Under the classic warrant-preference model, the role of the judiciary is primarily one of a fact finder. A magistrate who is requested to issue a warrant will engage in an inquiry that is tied to the central question of whether sufficient facts exist to constitute probable cause. Even in the review of the constitutionality of a warrantless search that has already taken place, a court will focus on questions of historical fact (for example, whether exigent circumstances existed that excused obtaining a warrant). In these contexts, the judiciary is overseeing executive- and legislative-authorized intrusions through fact-finding that is then measured against Fourth Amendment benchmarks such as probable cause and exigency. A court, in other words, is not being asked to independently determine as a policy matter whether a search is "reasonable" (for example, whether the search of the individual's house was a sound policy decision); rather, the judiciary is determining the search's legitimacy by finding the historical facts that preceded the intrusion (for example, whether probable cause of drugs in the house existed that allowed the judge to issue the war-

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[40] Bd. of Educ. v. Earls, 536 U.S. 822 (2002).

[41] *See Von Raab*, 489 U.S. at 656.

rant to search the individual's house).

By contrast, once courts are asked to start assessing the "reasonableness" of intrusions like sobriety checkpoints or drug tests, the judiciary is placed in the position of having to engage in a policy inquiry fashioned as a balancing test of the government's need for the program against the level of intrusion on the citizen. This new role is particularly important because it no longer centers around historical facts, but requires the Court to decide how much independence it should exercise in assessing whether an executive or legislative search is reasonable. And in its early cases using the reasonablenss balancing test, the Court adopted what appeared to be a fairly deferential approach.[42] In his opinion for the Court upholding sobriety checkpoints, for example, Justice Rehnquist expressly stated that "for purposes of Fourth Amendment analysis, the choice among . . . reasonable alternatives remains with the governmental officials who have a unique understanding of, and a responsibility for, limited public resources . . . ."[43]

This deferential approach was particularly evident in the early "special needs" case of *Von Raab*. In justifying suspicionless drug testing of Customs Service employees, the Court was presented a record with scant evidence of drug use by the employees who were to be tested.[44] While the government suggested that Customs Services agents using drugs might be susceptible to blackmail or could be dangerous if carrying guns, it was unable to present evidence that such problems were occurring.[45] The majority finessed the problem by starting with the assumption that "the traditional-probable cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the

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[42] A major complaint of the dissents in the "special needs" cases was that the majority was deferring to the government's assessment of the program's need and efficacy. *See, e.g., Skinner*, 489 U.S. at 652 (Marshall, J., dissenting) (criticizing the majority's "blind acceptance of the Government's assertion [that the program would deter substance abuse by workers]").

[43] *Sitz*, 496 U.S. at 453-54.

[44] *Von Raab*, 489 U.S. at 673.

[45] *Id.* at 674.

Government seeks to *prevent* the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person."[46] This assumption allowed the majority to gloss over the absence of any showing that the Customs Service was actually facing a problem with drug use and to instead give the government the power to infer a potential problem based merely on the fact that a drug problem exists in society generally: "It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context."[47]

Justice Scalia in his dissent highlighted the lack of any evidence, pointing out that "[t]he Court's opinion . . . will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees."[48] Justice Scalia found the lack of a supporting record particularly disturbing because it led him to conclude that the government's real purpose was merely a symbolic one of proving that the Service was "clean," a purpose that Scalia thought it "obvious . . . is unacceptable."[49] Justice Scalia's objection, therefore, was that the Court was not vigorously testing the government's justifications, but was allowing the government to rely upon generalizations rather than demonstrating that a problem existed.[50] He concluded that "if such a generalization suffices . . . the Fourth Amendment has become a frail protec-

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[46] *Id.* at 668 (citations omitted).

[47] *Id.* at 675 n.3.

[48] *Id.* at 681 (Scalia, J., dissenting).

[49] *Id.* at 686-87 (Scalia, J., dissenting) ("I do not believe for a minute that the driving force behind these drug-testing rules was any of the feeble justifications put forward by counsel here and accepted by the Court."). Justice Scalia's belief that a purely symbolic purpose would not support a Fourth Amendment "special needs" finding appears to have been vindicated in the later case of *Chandler v. Miller*, 520 U.S. 305, 323 (1995) (holding requirement of drug testing of candidates for state office invalid); *see infra* notes 52-63 and accompanying text.

[50] *Von Raab*, 489 U.S. at 685-87 (Scalia, J., dissenting); *see also* Skinner v. Ry. Labor Executive Ass'n, 489 U.S. 602, 653 (1989) (Marshall, J., dissenting) ("The majority's credulous acceptance of the [Federal Railway Administration]'s deterrence rationale is made all the more suspect by the agency's failure to introduce, in an otherwise ample administrative record, *any* studies explaining or supporting its theory of accident deterrence.").

tion indeed."[51]

One effect of the Court's movement to a reasonableness test when coupled with a deferential approach, therefore, was to grant the legislature and executive branches greater discretion under the Fourth Amendment. The Court did not completely abdicate the Fourth Amendment's concern with controlling discretion in these early "special need" cases, but tended to focus on guarding against "standardless and unconstrained discretion" being granted to the officer in the field rather than on scrutinizing the policy judgment of the need for the search in the first place.[52] As a result, the general warrant's potential vice of the searches being conducted without meaningful judicial oversight appeared to be gaining a foothold. While still a far cry from government officials ransacking homes on a random basis, the specter of government intrusions without individualized suspicion based upon a bureaucrat or government official's determination that a "special need" for such an intrusion existed began to take shape.

III. *CHANDLER, EDMOND* AND *FERGUSON*: THE EMERGING ROLE OF THE COURT AS "POLICY MAGISTRATE"

The Court's sensitivity to the possibility that the "special needs" category of cases might quickly expand and swallow up the Amendment surfaced in *Chandler v. Miller*.[53] In *Chandler*, the Georgia state legislature had passed a statute requiring that before a candidate could be placed on the ballot the candidate must within thirty days of qualifying for the election or nomination present a certificate from a state-approved laboratory stating that the candidate had submitted to a urinalysis drug test and tested negative.[54] The statute applied to state offices ranging from the position of Governor to the

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[51] *Von Raab*, 489 U.S. at 684 (Scalia, J., dissenting). Justice Scalia recognized that in certain contexts, such as a nuclear power plant, a potential disaster might justify the inability to demonstrate a problem at the moment. *Id.* (Scalia, J., dissenting).

[52] Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 454 (1990) (quoting Delaware v. Prouse, 440 U.S. 648, 661 (1979)).

[53] 520 U.S. 305 (1995).

[54] *Chandler*, 520 U.S. at 309.

Commissioner of Agriculture.[55] All judicial candidates also were subject to the drug testing requirement.[56] The Libertarian Party nominees for state offices challenged the state statute in federal court as violating the Fourth Amendment.[57]

The lower federal courts had upheld the drug testing requirement despite a lack of evidence that Georgia's elected officials were involved with drug abuse.[58] In particular, the lower courts relied upon the Supreme Court's approval in *Van Raab* of drug testing based on the mere potential for blackmail if a Customs employee in a sensitive position should develop a drug problem, rather than because of any evidence of an actual drug problem in the Customs Service.[59] Not unreasonably, the Eleventh Circuit majority had found similar considerations applied to individuals holding state elected offices and understood the Supreme Court's prior cases as not applying a particularly strict concept of what constituted a "special need" so long as it served interests other than the ordinary needs of law enforcement.[60]

Justice Ginsburg, writing for the majority in an 8-1 decision, however, attempted to cabin the earlier decisions upholding suspicionless searches as belonging to a "closely guarded category" of cases "involving limited circumstances."[61] In making her characterization of these prior cases, Justice Ginsburg stressed those parts of their holdings that made mention of qualities such as "surpassing safety interests,"[62] "grave safety threats,"[63] "high risk positions,"[64] and "immediate crisis."[65] Judged against these types of government needs and with the State of Georgia conceding during oral argument that no evidence existed of drug abuse by public

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[55] *Id.* at 309-10.
[56] *Id.* at 310.
[57] *Id.*
[58] *Id.* at 311.
[59] *Id.*
[60] *Id.*
[61] *Id.* at 308-09.
[62] *Id.* at 315 (describing *Skinner* and drug testing of railroad workers).
[63] *Id.* at 316 (describing *Von Raab* and testing of Customs Service employees).
[64] *Id.*
[65] *Id.* (describing *Vernonia* and testing of student athletes).

office holders,[66] the majority opinion was able to conclude that "notably lacking . . . is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule [of individualized suspicion]."[67] Justice Ginsburg also noted that the statute was not "well designed" to effectuate its purpose of catching drug users running for public office because of the ease of scheduling the test to avoid testing positive (the candidate knew the date that he or she would be tested); the state, therefore, "ha[d] offered no reason why ordinary law enforcement methods would not suffice . . . ."[68]

The *Chandler* Court thus made a strenuous effort to characterize its prior "special needs" cases as the exception rather than the rule. The Court especially went out of its way to try and limit the effects of *Von Raab*'s approval of drug testing despite the absence of any evidence of drug abuse, a void which Justice Scalia's dissent in *Von Raab* had made a central feature of his argument that the Court was approving drug testing as a mere symbolic gesture.[69] The *Chandler* majority argued that *Von Raab* was "[h]ardly a decision opening broad vistas for suspicionless searches [and] must be read in its unique context [of employees involved in drug interdiction and not subject to day-to-day scruntiny]."[70] Consequently, the majority concluded, the lack of evidence of drug abuse by public officials relegated Georgia's justification for drug testing merely to one of "the image [that] the State seeks to project," meaning that "the need revealed, in short, is symbolic, not 'special'" and, therefore, must fail.[71]

Chandler's rhetoric presented a very strong statement limiting suspicionless searches, with the Court engaging in some tough constitutional talk warning that its prior cases

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[66] During oral argument the state's attorney remarked, "[T]here is no such evidence [and] to be frank, there is no such problem as we sit here today." *Id.* at 319.

[67] *Id.*

[68] *Id.* at 320.

[69] *See supra* notes 47-50 and accompanying text.

[70] *Chandler*, 520 U.S. at 321.

[71] *Id.* at 321-22.

should not be misunderstood.[72] Individualized suspicion was still the norm and, the Court admonished, any departure had better be justified by a "special" need and not merely a "symbolic" one.[73] The *Chandler* decision also ended what had started to become a steady march of victories by the government in defending programs of suspicionless searches. The Court, therefore, appeared to be retaking some of the Fourth Amendment ground that it arguably had conceded to the legislative and executive branches in cases like *Von Raab*.

At the time *Chandler* was decided, though, it was difficult to ascertain how seriously to take the Court's flexing of its Fourth Amendment muscle when it came to suspicionless searches. The Court in other areas of criminal procedure has sometimes used relatively easy cases to make an emphatic point about the constitutional issue at stake, but then has failed to provide meaningful follow-through in more difficult cases.[74] And *Chandler* was an easy case in many ways. The state of Georgia candidly admitted at oral argument that it had made no effort to develop a record supporting the need for drug testing elected officials and that little likelihood existed of actually screening out a marijuana-smoking or cocaine-snorting individual anxious to become Commissioner of Agriculture or Governor. Indeed, at points the oral argument slipped into jocularity, with Mr. Chandler at one point suggesting to laughter in the courtroom that one might be able to "argue that drug users would [not] be any worse than [what] the General Assembly Georgia has now," adding that "there's an old saying down in Georgia that no man's liberty or property is safe as long as [the Legislature is] in session."[75] In short, unlike in *Von Raab*, the state made no effort to act as if the drug testing statute was anything other than a symbolic gesture, allowing the Court to strike down a purely symbolic use of suspicionless drug testing without having to proceed

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[72] *Id.* at 315-21.

[73] *Id.* at 322.

[74] *See, e.g.*, Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of* Brady v. Maryland, 33 MCGEORGE L. REV. 643, 644 (2002).

[75] Oral argument at 54-55, Chandler v. Miller, 520 U.S. 305 (1997) (No. 96-126) (argued Jan. 14, 1997).

beyond the state's proffered justification or having to scrutinize the state's arguments about efficacy.

What might happen in a more difficult case still remained to be seen. Justice Ginsburg had written strong words about the "closely guarded" class of suspicionless searches, but other cases like *Skinner*, *Von Raab* and *Vernonia* all contained reasoning that lent themselves to a less restrictive reading calling for a more deferential stance towards the legislative and executive branches' judgment that a suspicionless search was necessary. This was the reading that the Eleventh Circuit majority had adopted below[76] and that Chief Justice Rehnquist put forward as the lone dissenter in *Chandler*.[77] The Chief Justice argued that the notion of a "special need" had been "used in *Skinner* and *Von Raab* . . . in a quite different way than it is used by the Court today,"[78] and emphasized that the Court's touchstone for assessing a search under the Fourth Amendment was that it need only be "reasonable."[79] The Chief Justice maintained, therefore, that "[u]nder our precedents, if there was a proper governmental purpose other than law enforcement, there was a 'special need'" and the Court should defer to the legislative policy judgment so long as it was "reasonable."[80] Using this far more deferential viewpoint, Chief Justice Rehnquist argued that Georgia's lack of any factual finding of pot smoking in the Governor's mansion was not troubling under the Fourth Amendment because the legislature is free to enact prophylactic measures to prevent the problem from ever arising.[81] This was true, he maintained, even if the measures might strike some as over the top: "[n]othing in the Fourth Amendment or in any other part of the Constitution prevents a State from enacting a statute whose principal vice is that it may seem misguided or even silly to the Members of this Court."[82]

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[76] *Chandler*, 520 U.S. at 311-12.
[77] *Id.* at 325-28 (Rehnquist, C.J., dissenting).
[78] *Id.* at 325 (Rehnquist, C.J., dissenting).
[79] *Id.* (Rehnquist, C.J., dissenting).
[80] *Id.* at 325, 328 (Rehnquist, C.J., dissenting).
[81] *Id.* at 324 (Rehnquist, C.J., dissenting).
[82] *Id.* at 328 (Rehnquist, C.J., dissenting).

Perhaps sensing, though, that *Chandler*'s facts provided an easy target for the Court to declare the importance of individualized suspicion without facing much constitutional fallout, the Chief Justice's dissent sounded almost sanguine despite his disagreement with the majority's result. In ending his dissent, the Chief Justice seemed to suggest that the majority's strong stance was a bluff, stating, "Lest readers expect the holding of this case to be extended to any other case, the Court notes that the drug test here is not a part of a medical examination designed to provide certification of a candidate's general health."[83] His dissent appeared to predict, therefore, that if the state in the future more carefully crafted its "special need"—for example, presenting drug testing as part of a required health examination for a candidate—that the Court would move back to a more deferential stance.[84] From this perspective, then, the *Chandler* case could be seen as a Fourth Amendment outlier where, despite the Court's broad pronouncements, all it really was holding was that suspicionless searches for an admittedly symbolic purpose would not pass constitutional muster.

But if *Chandler* presented itself at the fringes of what constituted a "special need," the subsequent cases of *Edmond* and *Ferguson* fit far more comfortably within the mainstream of the Court's prior special need cases: *Edmond*'s utilization of narcotic checkpoints[85] seemed a close cousin to the sobriety checkpoints approved in *Sitz*,[86] and *Ferguson*'s drug testing of pregnant mothers to help prevent the birth of crack-addicted babies[87] appeared a classic "special need." Yet the Court struck down both programs[88] and in the process provided interesting insights and raised interesting questions about the future of suspicionless searches under the Fourth Amendment.

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[83] *Id.* at 327 (Rehnquist, C.J., dissenting).
[84] *See id.* (Rehnquist, C.J., dissenting).
[85] City of Indianapolis v. Edmond, 531 U.S. 32, 34 (2000).
[86] Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).
[87] Ferguson v. City of Charleston, 532 U.S. 67, 70 n.1 (2001).
[88] *See Ferguson*, 532 U.S. at 86; *Edmond*, 531 U.S. at 48.

A. City of Indianapolis v. Edmond

As a physical intrusion, the narcotics checkpoint in *Edmond* was well within the norm of prior checkpoints and far more impressive when judged by efficacy.[89] The Indianapolis Police Department had conducted six checkpoints between August and November 1998 that alerted drivers as they approached that a narcotics checkpoint was located a certain distance ahead at which a "naroctics K-9" would be in use.[90] The checkpoints' design reflected earlier Supreme Court warnings on the need to control field officer discretion, with written directives specifying how the officers stationed at each checkpoint should conduct the stops.[91] The instructions detailed that a certain number of cars were to be stopped in a particular sequence and that each stop was to be limited to under five minutes during which the officer would ask for a license and registration while a narcotics-detecting dog walked around the stopped vehicle.[92] To highlight the checkpoint's relative physical non-intrusiveness, Judge Easterbrook described the checkpoints in his Seventh Circuit dissenting opinion as "a five-minute wait with man's best friend outside."[93]

The six checkpoints that had been conducted stopped 1161 cars and resulted in the arrest of 104 motorists for an arrest rate of 9.4% (approximately half of the arrests were for drug-related offenses and half were for other offenses).[94] The nearly one out of ten arrest rate was far more efficient compared to the approximately one out of one thousand success rate for immigration checkpoints or one out of a hundred for sobriety checkpoints, a contrast that led Judge Easterbrook to deem the narcotics checkpoint as "spectacularly successful" by comparison to earlier checkpoints approved by the Supreme Court.[95] Therefore, judged by the criteria of physical intru-

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[89] *See Edmond*, 531 U.S. at 34-36.
[90] *Id.*
[91] *Id.* at 35-36.
[92] Edmond v. Goldsmith, 183 F.3d 659, 661 (7th Cir. 1999).
[93] *Edmond*, 183 F. 3d at 671 (Easterbook, J., dissenting).
[94] *Id.* at 661.
[95] *Id.* at 666 (Easterbrook, J., dissenting). The actual success rate was .12%

siveness, limits on the discretion of the field officers, and efficiency, the Indianapolis Police Department had appeared to do everything by the Fourth Amendment book based upon prior Supreme Court rulings.

Yet, the Supreme Court struck down the checkpoints by a six to three margin[96] and, in fact, the tally of Justices disapproving of the checkpoints was even higher.[97] Although Justice Thomas was one of the three dissenters, he dissented only because he believed that the checkpoints were valid based upon *Sitz* and *Martinez-Fuerte*'s holdings.[98] But after expressing this view, Justice Thomas invited reconsideration of *Sitz* and *Martinez-Fuerte* as he expressed his "doubt that the Framers of the Fourth Amendment would have considered 'reasonable' a program of indiscriminate stops of individuals not suspected of wrongdoing."[99] Seven Justices thus thought the narcotics checkpoint ran afoul of the Fourth Amendment either because the program did not satisfy *Sitz* or because *Sitz* itself was flawed.

To someone who had not followed the rise of the reasonableness test and the Court's approval of suspicionless searches and seizures in the first cases it heard, *Edmond* perhaps would not seem particularly remarkable. In many ways, Justice O'Connor's *Edmond* opinion reads like a cut-and-paste application of the Fourth Amendment principles that Justice Ginsburg laid out in *Chandler*. The *Edmond* analysis began with the proposition that "ordinarily" individualized suspicion can be dispensed with only in "limited circumstances" where a "program was designed to serve 'special needs' beyond the normal need for law enforcement."[100] Justice O'Connor then proceeded to note that, "[w]e have never approved a checkpoint program whose primary purpose was to detect evidence

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for the immigration checkpoints in *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) and 1.6% for the sobriety checkponts at issue in *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990).

[96] *Edmond*, 531 U.S. at 33.

[97] *See id.* at 56 (Thomas, J., dissenting).

[98] *Id.* (Thomas, J., dissenting).

[99] *Id.* (Thomas, J., dissenting).

[100] *Id.* at 37.

of ordinary criminal wrongdoing,"[101] an observation that was to take on a mantra-like quality as the opinion repeated the essence of this statement six more times before the opinion ended.[102]

What makes *Edmond* worth noticing, and arguably marks a new phase of Fourth Amendment decision making, was the majority's willingness to step into the record and scrutinize the state's justification.[103] Recall that in *Chandler* judicial examination of the legislative justification was unnecessary because the state made little effort to adorn their reasons for engaging in drug testing as anything other than a symbolic gesture.[104] In *Edmond*, on the other hand, the City of Indianapolis argued that it was within the realm of "special needs" cases even if part of its purpose was to detect evidence of ordinary criminal wrongdoing.[105] As the City pointed out, previous checkpoint cases had been approved in *Sitz* and *Martinez-Fuertes* where the underlying offenses also had led to criminal prosecution for DUI and smuggling.[106] The City maintained, therefore, that because the narcotics checkpoints could be seen as having the dual purpose and clearly approved "special need" of highway safety in addition to uncovering drug possession, the checkpoints should be approved.[107]

The majority's response was strikingly emphatic in rejecting the City's arguments.[108] Even more important than the majority's factual limitation of *Sitz*'s import to where "society [is] confronted with . . . immediate, vehicle-bound threat to life and limb"[109] and of *Martinez-Fuerte* to that of a specialized border control case,[110] was the majority's willingness to "look more closely at the nature of the public interests that

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[101] *Id.* at 41.
[102] *See id.* at 41-44, 47-48.
[103] *See id.* at 40-45.
[104] *Chandler*, 520 U.S. at 321-22.
[105] *Edmond*, 531 U.S. at 46-47.
[106] *Id.* at 34, 38-39, 47.
[107] *Id.* at 46.
[108] *Id.* at 46-47.
[109] *Id.* at 43.
[110] *Id.* at 41.

such a regime is designed principally to serve."[111] Indeed, the Court not only rejected the City's argument that "where the government articulates and pursues a legitimate interest for a suspicionless stop, courts should not look behind that interest to determine whether the government's 'primary purpose' is valid,"[112] the majority identified an active role for the judiciary of "examin[ing] the available evidence to determine the primary purpose of the checkpoint program."[113]

Once subjected to such scrutiny, the majority found that the narcotics checkpoint failed because the program "unquestionably has the primary purpose of interdicting illegal narcotics."[114] In invalidating the narcotics checkpoints, the Court demonstrated a sensitivity to the possibility that if it allowed a general nexus to suffice between general law enforcement purposes and a broadly proposed "special need," then, "at this high level of generality, there would be little check on the ability of the authorities to construct roadblocks for almost any conceivable law enforcement purpose."[115] Unlike cases based upon probable cause where "subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis,"[116] the Court put the executive and legislative branches on notice that it would analyze suspicionless searches to ensure that the government's primary purpose was not a "ruse" offered in "bad faith" or as a "pretext" for "gathering evidence of violations of the penal laws."[117] The Court warned that without meaningful review to ensure that the primary purpose was not general crime detection camouflaged by a "special needs" veneer, "law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check."[118]

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[111] *Id.* at 43.

[112] *Id.* at 45 (quoting Brief for Petitioners).

[113] *Id.* at 46.

[114] *Id.* at 40.

[115] *Id.* at 42.

[116] *Id.* at 45 (quoting Whren v. United States, 517 U.S. 806, 813 (1996)).

[117] *Id.* at 45 (summarizing why the Court had approved inventory searches and administrative inspections in previous cases).

[118] *Id.* at 46.

After *Edmond*, the Court's vision of the judiciary's role in evaluating programs of suspicionless searches included a need to look behind the government's stated justifications and examine the actual factual basis for the search. Indeed, the image of the *Edmond* Court moving through the City's proffered justifications and rejecting them based upon the factual record was in many ways that of a magistrate at a suppression hearing evaluating the state's case to determine whether factual probable cause had existed to justify a search.

By taking on this active role, the Court became what we might call a "policy magistrate." That is, the Court undertook an analysis that paralleled that of a magistrate looking for traditional probable cause, only it was searching the record for whether the government's true primary purpose justified the checkpoint rather than for whether an informant's tip had given sufficient suspicion of wrongdoing. The Court in *Edmond* seemed to recognize more than ever before that with intrusions that operated without the constraint of individualized suspicion, the judiciary either had to actively oversee the government's policy justifications or else effectively cede the Fourth Amendment over to the legislative and executive branches. Unwilling to do this, the majority placed the judiciary into the pivotal role of determiner of probable cause, albeit the "flexible probable cause" of weighing the government interest against the citizen's privacy interest.[119] As the Court stepped into the role of "policy magistrate," the majority acknowledged "the challenges inherent in a purpose inquiry" but found the inquiry to be a necessary "means of sifting abusive governmental conduct from that which is lawful."[120]

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[119] The role of "policy magistrate" actually calls back to the language of the case that first released the reasonableness- balancing-test genie. In *Camara*, the Court, while wanting to still fit within the warrant-preference view of the Fourth Amendment but not wanting to require individualized suspicion for housing inspections, referred to its newly minted reasonableness balancing test as a determination of "probable cause," *see* Camara v. Mun. Court, 387 U.S. 523, 538-39 (1967). *See also* Sundby, *supra* note 8, at 399-401.

[120] *Edmond*, 531 U.S. at 46-47. The majority also saw the need for a judicial inquiry into the government's purpose for suspicionless searches as fitting within a broader "constitutional jurisprudence." *Id.*

B. Ferguson v. City of Charleston

Even after *Edmond*, a Fourth Amendment skeptic might have suggested that although the Court had assumed the role of "policy magistrate" for suspicionless programs, it had not proven that it would take the role seriously. The city's mistake in *Edmond* arguably was that it had been too open about its purpose in declaring "NARCOTICS CHECKPOINT (5) MILE AHEAD, NARCOTICS K-9 IN USE, BE PREPARED TO STOP."[121] What if instead the city set up a sobriety checkpoint like the Court approved of in *Sitz* and during the checkpoint had a narcotics K-9 sniff around the car? Given that the Court has held that a dog sniff is not a "search"[122] and that sobriety checkpoints have the Court's Fourth Amendment seal of approval,[123] might not the dog sniff now be permissible even though the checkpoint experience from the motorist's viewpoint would be almost identical? The majority noted the possibility of a checkpoint with a "secondary purpose of interdicting narcotics" and stated that it need not decide the case, offering only a "*cf.*" cite to *New Jersey v. T.L.O.* with a parenthetical noting that a "search must be 'reasonably related in scope to the circumstances which justified the interference in the first place.'"[124] Such an answer seemed rather tepid after its earlier and bolder warnings in the opinion against ruses and pretexts. Might *Edmond* then end up being all Fourth Amendment sound and no fury?[125]

The Court did not answer the question directly in *Ferguson*, but its approach indicated that it viewed its emerging role of "policy magistrate" as more than a rubber stamp. *Ferguson* arose out of a civil lawsuit filed by women who had

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[121] *Id.* at 35-36 (quoting Appeal to Petition for Certiorari 57).

[122] United States v. Place, 462 U.S. 696, 707 (1983).

[123] *Sitz*, 496 U.S. at 451-55.

[124] *Edmond*, 531 U.S. at 47 n.2 (citing New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)).

[125] Professor LaFave has sarcastically suggested that if the Court should adopt such a formalistic reading that it should appear on a David Letterman segment of "Stupid Supreme Court Tricks." Wayne R. LaFave, *The Fourth Amendment as a "Big Time" TV Fad*, 53 HASTINGS L.J. 265, 274 (2001).

received obstetrical care at the Medical University of South Carolina (MUSC) in Charleston, South Carolina.[126] The plaintiffs had been arrested as part of a MUSC program that tested for the presence of cocaine in the urine of patients who were pregnant or who had just given birth.[127] If a woman under the program tested positive, she could be charged with an offense ranging from simple possession to distribution depending upon the stage of her pregnancy.[128] The plaintiffs appealed an adverse finding by a jury that they had consented to the testing.[129] The Fourth Circuit in affirming, however, did not even reach the issue of consent because it held that, regardless of consent, the drug testing was a reasonable "special needs" program "conducted . . . for medical purposes wholly independent of an intent to aid law enforcement efforts."[130]

The Fourth Circuit's finding of a special need "wholly independent" of law enforcement presented to the Court a more difficult case than *Edmond* in defining the judiciary's proper role as a "policy magistrate" under the Fourth Amendment. While the *Edmond* Court had stated that it would examine the record for the government's primary purpose and not simply accept any proffered purpose, the majority in *Edmond* had not been forced to turn over too many evidentiary stones in looking for the city's primary purpose. The checkpoint signs themselves had declared the checkpoints to be for narcotics and the City had conceded that the "checkpoint program unquestionably ha[d] the primary purpose of interdicting illegal narcotics."[131] In *Ferguson*, on the other hand, the government had put forward the undeniably legitimate medical purpose of testing expecting mothers for use of narcotics as a means of "'protect[ing] both the mother and unborn child.'"[132]

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[126] *Ferguson*, 532 U.S. at 70, 73.

[127] *Id.* at 73.

[128] *Id.* at 72. Under the first version of the program the woman was arrested immediately. *Id.* Under a later modified version, the woman was first given the chance to undergo a treatment plan. *Id.*

[129] *Id.* at 74.

[130] Ferguson v. City of Charleston, 186 F.3d 469, 477 (4th Cir. 1999).

[131] *Edmond*, 531 U.S. at 40.

[132] *Ferguson*, 532 U.S. at 98 (Scalia, J., dissenting) (quoting district court's

If the Court were to find a Fourth Amendment problem, therefore, it would have to scrutinize the underlying record and develop its own judgment of whether the drug testing satisfied its developing "special needs" jurisprudence.

Justice Stevens in writing for a majority of five Justices made clear that the Court was not bound by the city's "beneficent" purpose but was obligated under *Chandler* and *Edmond* to engage in a "close review" of the program to see if its purpose was "'ultimately indistinguishable from the general interest in crime control.'"[133] Stevens described *Edmond*'s holding as obligating the Court to "*consider all the available evidence* in order to determine the relevant primary purpose,"[134] and the majority proceeded to consider the evidence in detail.

Particularly noticeable was the majority's extensive description of the origins of MUSC's policy beginning with how Nurse Shirley Brown, the case manager of the hospital's obstetrics department, had heard a news story about police in another city arresting pregnant users of cocaine on a theory of child abuse.[135] As the majority unfolded the sequence of events, Brown raised the idea with the hospital's attorney who, in turn, contacted the city's prosecutor's office.[136] A joint task force with law enforcement and hospital personnel was formed and eventually a policy was formulated whereby a pregnant patient was tested for cocaine use if she met certain broad criteria.[137] After an initial positive test, the patient was arrested if she tested positive a second time or failed to attend a substance abuse program (when the policy was first implemented, a positive drug test led to an immediate arrest).[138]

In striking down the program, the majority concluded that

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findings).

[133] *Id.* at 81 (quoting *Edmond*, 531 U.S. at 48).

[134] *Id.* (emphasis added).

[135] *Id.* at 70.

[136] *Id.* at 70-71.

[137] The nine criteria covered a wide range of factors such as "[i]ncomplete prenatal care" and did not constitute suspicious behavior of drug use. *Id.* at 71 n.4, 77 n.10.

[138] *Id.* at 72.

what distinguished MUSC's policy from the drug testing that the Court had approved of in *Von Raab*, *Skinner*, and *Acton* was that "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment."[139] As the *Ferguson* majority pointed out, in all of the other programs the role of law enforcement was either non-existent or minimized.[140] The minimal role of law enforcement in the previous cases stood in stark contrast to the formulation and execution of MUSC's policy where "throughout the development and application of the policy, the Charleston prosecutors and police were extensively involved in the day-to-day administration of the policy."[141] The intertwining of the police and hospital personnel went so far as to have the police tutoring hospital laboratory personnel on how to preserve a chain of custody.[142]

The majority concluded, therefore, that even if the city's ultimate goal was to protect maternal and fetal health, "the immediate objective of the searches was to generate evidence *for law enforcement purposes.*"[143] In reaching this conclusion, the *Ferguson* majority echoed the *Edmond* Court's concern that if the government simply could invoke a broad non-law enforcement goal to justify its proposed law enforcement action, then essentially all law enforcement actions would become a "special needs" search under the Fourth Amendment.[144] As the *Ferguson* majority observed: "Because law enforcement involvement always serves some broader social purpose or objective . . . virtually any nonconsensual suspicionless search could be immunized under the special needs doctrine by defining the search solely in terms of its ultimate, rather than immediate, purpose."[145] Finding that

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[139] *Id.* at 80; *see id.* at 80 n.16 (noting the Court's decisions in *Von Raab*, *Skinner* and *Acton*).

[140] *Id.* at 80 n.16.

[141] *Id.* at 82.

[142] *Id.* at 82 n.19.

[143] *Id.* at 83.

[144] *Id.* at 83 nn.20-21.

[145] *Id.* at 84.

the immediate primary purpose of MUSC's drug testing was "*for the specific purpose of incriminating those patients,*"[146] the majority found that the proffered "special need" of medical health could not excuse the extensive entanglement of law enforcement and prosecution.[147]

The *Ferguson* majority thus took the Court's role as "policy magistrate" presiding over a determination of "flexible probable cause" in suspicionless searches to a new and greater level of inquiry. Unlike *Edmond* where the "special need" of highway safety was fairly characterized as a secondary rather than primary purpose based upon the City of Indianapolis's own admissions,[148] in *Ferguson* it was clear that a primary purpose *was* the protection of fetal health in response to a perceived epidemic of "crack babies."[149] Indeed, MUSC's testing program at first had been instituted without referrals to law enforcement, and it was only after the level of cocaine use among expectant mothers did not seem to abate that the threat of arrest became part of the program's effort to curtail cocaine use by expectant mothers.[150] In a way, then, the Court's objection in *Ferguson* was quite different from its objection in *Edmond*. Its concern was not that the city's special need was a pretext or a ruse to gain greater law enforcement powers—even the majority did not seem to doubt that the program was instituted out of a genuine concern over crack babies—but rather that it did not believe that the special need could support such a heavy involvement of law enforcement in its pursuit.[151] In arriving at this conclusion, the

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[146] *Id.* at 85.

[147] *Id.* at 84-86.

[148] *Edmond*, 531 U.S. at 46-47.

[149] *Ferguson*, 532 U.S. at 70 n.1.

[150] *Id.* at 70; *see also id.* at 99-100 (Scalia, J., dissenting).

[151] Justice Scalia in his dissent suggested that the majority's reasoning essentially was that "the purported medical rationale was merely a pretext; there was no special need." *Id.* at 98 (Scalia, J., dissenting). While the majority may have expressed doubts about the medical rationale, *see infra* note 153 and accompanying text, it did not appear to view it as a pretext. Rather, as will be argued below, the majority's objection appears to be that the city tried to achieve those means by obtaining incriminating evidence. *See infra* notes 169-71 and accompanying text.

Court demonstrated a fairly far-seeking view of its duty as magistrate to "consider all the available evidence"[152] in making its "flexible probable cause" determination of whether the program justified a heavy law enforcement involvement. The majority even questioned in a footnote the wisdom of MUSC's judgment that threatening prosecution would curtail drug use among expectant mothers:

> It is especially difficult to argue that the program here was designed simply to save lives. *Amici* claim a near consensus in the medical community that programs of the sort at issue, by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health."[153]

The *Ferguson* majority thus took review of the government's "special needs" justification a step further than either *Chandler* or *Edmond*. *Chandler* had found the state's symbolic special need wanting as a justification under the Fourth Amendment,[154] and *Edmond* had found that the city's primary purpose of narcotics interdiction could not be saved by a secondary justification of highway safety that was too far removed from the checkpoint's primary purpose.[155] In *Ferguson*, on the other hand, the Court scrutinized an admittedly valid "special need" outside that of general law enforcement, the need to protect maternal and fetal health, but objected to *the means* that MUSC was using to achieve the special

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[152] *Ferguson*, 532 U.S. at 86.

[153] *Id.* at 84 n.23. At oral argument, one of the Justices when questioning the city's attorney noted that "all the material in the amicus briefs and all the studies . . . suggest that this type of program does not help . . . the fetus. Rather [because drug-using mothers may forego prenatal treatment if tested] . . . this kind of program . . . probably hurts more fetuses than it helps." Oral Argument at 45-46, Ferguson v. City of Charleston, 532 U.S. 67 (2001) (No. 99-936) (argued Oct. 4, 2000). The same Justice a little later noted "I've tried to look up a little independently, where I've come to is the conclusion—I'm not a doctor or epidemiologist, but it seems to me that the studies on cocaine abuse are pretty inconclusive and—as to how they affect the fetus, and even if they aren't, they're pretty one-sided, the studies, that this kind of thing hurts the fetus because mothers don't come in." *Id.* at 46.

[154] *See Chandler*, 520 U.S. at 322.

[155] *See Edmond*, 531 U.S. at 46-47.

need. The majority did not speak of an invalid primary purpose as it had in *Edmond* but of an invalid "immediate objective"of gathering evidence for law enforcement as a way of accomplishing the primary and "ultimate goal" of trying to reduce the incidence of crack babies.[156] To make this determination, the majority delved into the record to trace the policy's origins, to determine how the policy was implemented, and even to raise questions over the wisdom of such a policy.

Despite the *Ferguson* majority's broad view of the Court's role as "policy magistrate," however, the holding did not necessarily secure a long-term role for the Court in closely reviewing the government's means of implementing suspicionless intrusions. While the majority condemned the use of law enforcement for the "immediate objective" of gathering evidence, a residual tension exists between *Ferguson* and previous cases in which the Court did approve of heavy law enforcement involvement in the "immediate" gathering of evidence: the sobriety checkpoint in *Sitz* which led to the immediate arrest of individuals driving under the influence,[157] an "administrative search" in *New York v. Burger* which resulted in the defendant being arrested and charged with five counts of possession of stolen automobile parts,[158] and a "special needs" search of a probationer's home in *Griffin v. Wisconsin* by police and the defendant's probation officer for a weapon.[159]

The *Ferguson* majority worked hard to distinguish these cases. *Sitz* was seen as a "checkpoint case" and not a "special needs" case (even though in *Edmond* the majority had, over the dissent's objection, relied upon the "special needs" cases to strike down the narcotics checkpoint).[160] The discovery of the stolen auto parts in *Burger* was optimistically characterized as "merely incidental to the purposes of the administrative search" even though carried out by uniformed police officers.[161] *Griffin*

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[156] *See Ferguson*, 532 U.S. at 82-83.

[157] *Sitz*, 496 U.S. at 448.

[158] New York v. Burger, 482 U.S. 691, 695 (1987).

[159] Griffin v. Wisconsin, 483 U.S. 868, 870 (1987).

[160] *Ferguson*, 532 U.S. at 83 n.21. The majority also suggested that the "checkpoint" cases involved a less severe intrusion than one going to "the body or home." *Id.*

[161] *Id.* Justice Brennan in his *Burger* dissent makes a rather convincing case

was seen as limited to the context of probationers who "have a lesser expectation of privacy."[162]

While each of these distinctions is defensible, the labor necessary to distinguish these prior cases highlights the difficulty and potential confusion of using a Fourth Amendment dividing line that turns upon whether the "immediate objective" was the gathering of evidence. Anticipating the possible confusion, Justice Kennedy in his concurrence specifically rejected the idea that a court should look at the immediate purpose of collecting the evidence as part of the "special needs" analysis rather than focusing on the ultimate goal to see if a "special need" existed.[163]

Moreover, the immediate objective/ultimate goal distinction, much like the primary/secondary purpose distinction used by the majority in *Edmond*, arguably only encourages the government to engage in Fourth Amendment game playing. If the Fourth Amendment problem in *Ferguson* simply is that the evidence-gathering for criminal prosecution occurred as part of the *immediate* objective, might not a program instead simply allow the legitimate medical testing for drugs to go forward first, and *then* require the hospital to turn over positive results through mandatory child abuse reporting laws? Both the concurring and dissenting opinions in *Ferguson* thought such a formal rearranging of the steps of the process would be valid under the majority's analysis,[164] creating what Justice Kennedy saw as "[o]ne of the ironies of the case . . . that the program now under review, which gives the cocaine user a second and third chance, might be replaced by some more rigorous system [of prosecution]."[165]

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that the discovery of criminal evidence via an administrative search carried out by uniformed police officers was anything but incidental. *Burger*, 482 U.S. at 718, 723-29 (Brennan, J., dissenting); *see* Sundby, *supra* note 8, at 408-11.

[162] *Ferguson*, 532 U.S. at 79 n.15.

[163] *Id.* at 87-88 (Kennedy, J., concurring). Justice Kennedy suggested that if applied rigorously, the majority's focus on the "immediate objective" instead of the "ultimate goal" would call into question all of the Court's prior "special needs" cases because "[b]y very definition, in almost every case the immediate purpose of a search policy will be to obtain evidence." *Id.* at 87 (Kennedy, J., concurring).

[164] *Id.* at 90 (Kennedy, J., concurring); *see id.* at 102-03 (Scalia, J., dissenting).

[166] *Id.* at 90 (Kennedy, J., concurring).

If the concurring and dissenting opinions are correct that the only part of the program that the city got wrong in *Ferguson* was the order in which it took the steps of drug testing and police involvement, *Ferguson*'s holding would be reduced to more form than substance. The ultimate message would amount to no more than a bureaucratic admonishment from the Court to the legislative and executive branches to more carefully maintain the appearance of their programs: use of evidence from suspicionless drug testing programs in criminal prosecutions is permissible, but the program must be designed so that it does not appear to have a law enforcement component upfront, even if significant penal consequences may follow later. As Justice Scalia sarcastically noted in his dissent, the City of Charleston's Fourth Amendment misstep, therefore, was "that . . . the police took the lesser step of initially *threatening* prosecution rather than bringing it [after the patient tested positive]."[166]

The majority opinion leaves open the possibility of this weak reading of *Ferguson*'s holding. Sensitive to what it termed the dissent's "hyperbole" that the majority must see reporting requirements as "clearly bad,"[167] the majority expressly "distinguishe[d] . . . circumstances in which physicians or psychologists, in the course of ordinary medical procedures aimed at helping the patient herself, come across information that under rules of law or ethics is subject to reporting requirements," a situation "which no one has challenged here."[168] This language, therefore, would not rule out a program instituted with an "immediate objective" of drug testing through "medical procedures" upon which a reporting requirement could later piggyback requiring that the results be turned over to the police.

A stronger reading of *Ferguson*'s holding, however, also is possible. While the majority did not reject outright the concurring and dissenting opinions' suggestion that merely re-ordering the medical testing so that it took place before police in-

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[166] *Id.* at 103 (Scalia, J., dissenting).
[167] *Id.* at 81 n.18.
[168] *Id.* at 80-81.

volvement might satisfy the Fourth Amendment, the majority also stated that the issue was not properly before the Court.[169] And how might a stronger reading of *Ferguson* move beyond mere formalism? The key lies in the *Ferguson* majority's careful wording of how a different case might be presented if the evidence of drug use was discovered *"in the course of ordinary medical procedures aimed at helping the patient herself."*[170] In a similar fashion, the majority later referred to the difference between a duty to disclose "evidence of criminal conduct that they *inadvertently* acquire in the course of *routine treatment*"[171] and criminal evidence obtained, as in *Ferguson* itself, *"for the specific purpose of incriminating those patients."*[172]

Words such as "ordinary," "helping," "inadvertently" and "routine" strongly indicate that the Court as "policy magistrate" would be obligated to examine the record for evidence to assure itself that any two-step testing/reporting program actually was adopted for the "special need" of the patient's benefit and not with an eye towards law enforcement. Such an inquiry would necessarily push the Court even further into an active role of a magistrate who is to "consider all the available evidence in order to determine the relevant primary purpose."[173] The inquiry might even necessitate a consideration of whether such a testing policy could be justified as a matter of medical judgment, because the medical community's judgment would be probative evidence of whether the testing program was truly adopted to "help[] the patient" so that discovery of any incriminating evidence would be an "inadvertent[]" byproduct,[174] or whether the program instead was instituted as part and parcel of a larger law enforcement plan against drug use.

The *Ferguson* holding, therefore, can be read in a non-for-

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[169] *Id.* at 85 n.24. The majority stated: "We decline to accept the dissent's invitation to make a foray into dicta and address other situations not before us." *Id.*

[170] *Id.* at 80-81 (emphasis added).

[171] *Id.* at 84-85 (emphasis added).

[172] *Id.* at 85.

[173] *Id.* at 81.

[174] *See supra* notes 170-72 and accompanying text.

malistic way that would allow the Court to pierce the veil of an administrative program that might appear to have a "primary purpose" or "immediate objective" that is not directed at gathering evidence of ordinary criminal wrongdoing, but in reality is intertwined with a general law enforcement program. Whether the Court is willing to envision its role of magistrate as justifying such an active inquiry into the record to ferret out the true "primary purpose" may very well turn upon how its role is justified. Undoubtedly, the more deeply the Court examines the record to ensure that "special needs" cases are a "closely guarded category" and works to divine the true "primary purpose" of any suspicionless search programs, the more the Court will be subjected to criticism for "taking yet another social judgment . . . out of democratic control, and confiding it to the uncontrolled judgment of th[e] Court . . . ." [175] The question then becomes whether a deep-seated Fourth Amendment value might justify the Court's emerging role of "policy magistrate" in testing the government's proffered "special need" against the evidence in the record.

IV. The General Warrants Doctrine Meets the Twenty-First Century

While the colonists' concerns over general warrants and writs of assistance have played an important role in the development of the Fourth Amendment during much of the twentieth century, the idea of a writ of assistance actually being issued seemed as likely an event as citizens being forced to quarter soldiers. As we have seen, the Court occasionally invoked the general warrant doctrine to object that a search warrant was not drafted with sufficient particularity, but these were judicially issued warrants that were still a far cry from

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[175] *Ferguson*, 532 U.S. at 96 (Scalia, J., dissenting). Imagine, for example, if the Court did strike down a reconstituted two-step drug testing program and in part relied upon a finding that the medical community's judgment was that drug testing of pregnant mothers is not medically sound (and, therefore, not part of a "routine" exam aimed at "helping the patient"). Such an examination of the record undoubtedly would spark pointed comments that the Court was assuming the role of a medical review board and going far beyond the bounds of legitimate judicial inquiry.

the eighteenth century episodes that epitomized the evils of general warrants. The abhorrence of general warrants was an important underlying value but did not enter everyday Fourth Amendment discourse because searches and seizures had for the most part been brought within the purview of judicial oversight through the warrant-preference model of the Amendment.

However, as suggested earlier, the rise of the reasonableness view of the Fourth Amendment coupled with the government's growing ability to engage in suspicionless searches has created the possibility of government intrusions that directly raise the concerns underlying general warrant searches. Indeed, the Court's emerging role as a "policy magistrate" in *Chandler*, *Edmond*, and *Ferguson* can be understood as a recognition by the Court that the dangers of general warrants lurk in suspicionless programs such as drug testing and narcotic checkpoints. To understand how these concerns underlie the Court's recent holdings and why they have gained a new resonance in today's world of expanding surveillance techniques and law enforcement powers, it is helpful to recall exactly why the Framers objected to general warrants.

Few captured the Framers' objections to general warrants as eloquently as the fiery James Otis in his argument presented to a court in Boston in February 1761 in opposition to the writs of assistance.[176] The writs were a form of a general warrant that authorized custom officers to search for goods that had been imported into the colonies in violation of England's tax laws.[177] The writs empowered the customs agents to search any place that they desired for smuggled goods and to order subjects of the Crown to assist in the search.[178] The writs thus bestowed a blanket power upon the customs agents that was in continuous effect for the life of the sovereign.[179] Because the writs were so wide ranging in scope and were in continual effect, the colonists grew to despise them as oppres-

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[176] *See infra* note 183 and accompanying text.

[177] Davies, *supra* note 18, at 561.

[178] POLYVIOS G. POLYVIOU, SEARCH AND SEIZURE: CONSTITUTIONAL AND COMMON LAW 10 (1982).

[179] *Id.*

sive instruments.

The opportunity to challenge the writs presented itself when King George II died in 1760. His death meant that the writs issued during his reign would soon expire, and the writs would only continue if a new grant of power was given. A group of Boston merchants hired James Otis to argue against the new issuance of the "hated" writs.[180] While Otis did not win the case and new writs of assistance eventually were granted, his argument that the writs were contrary to fundamental principles of constitutional law not only gave the court pause,[181] but according to John Adams, who witnessed Otis's argument, it "was the first scene . . . of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born. In fifteen years, namely in 1776, he grew up to manhood, and declared himself free."[182] The full rhetorical power of Otis's argument can only be appreciated if read in its entirety (and is a speech that every student of criminal procedure should be exposed to at least once):

> *May it please your honours*: I was desired by one of the court to look into the [law] books, and consider the question now before the court, concerning Writs of Assistance. I have accordingly considered it, and now appear not only in obedience to your order, but also in behalf of the inhabitants of this town, who have presented another petition, and out of regard to the liberties of the subject. And I take this opportunity to declare that, whether under a fee or not, (for in such a cause as this I despise a fee) I will to my dying day oppose, with all the powers and faculties God has given me, all such instruments of slavery on the one hand and villainly on the other, as this writ of assistance is. It appears to me (may it please your honours) the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of the constitution, that ever was found in an Eng-

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[180] *Id.* (quoting Stanford v. Texas, 379 U.S. 476, 481 (1965)).

[181] *Id.* at 11. After Otis's argument, the court asked for further information from England and heard further argument after the information was received before finally allowing new writs to issue. *Id.*

[182] *Id.* (quoting CHARLES FRANCIS ADAMS, LIFE AND WORKS OF JOHN ADAMS 248 (Boston, Little, Brown & Co. 1856). In fact, most of what is known about Otis's argument is due to Adam's description of what he witnessed. *Id.* at 10 n.4.

lish law-book. I must therefore beg your honours patience and attention to the whole range of an argument, that may perhaps appear uncommon in many things, as well as points of learning, that are more remote and unusual, that the whole tendency of my design may the more easily be perceived, the conclusions better . . . [discerned . . .], and the force of them better felt.

I shall not think much of my pains in this cause, as I engaged in it from principle. I was sollicited to engage on the other side. I was sollicited to argue this cause as Advocate-General, and because I would not, I have been charged with a desertion from my office; to this charge I can give a very sufficient answer, I renounced that office, and I argue this cause from the same principle; and I argue it with the greater pleasure, as it is in favour of British liberty, at a time, when we hear the greatest monarch upon earth declaring from his throne, that he glories in the name of Briton, and that the privileges of his people are dearer to him than the most valuable prerogatives of his crown. And as it is in opposition to a kind of power, the exercise of which in former periods of English history, cost one King of England his head and another his crown. I have taken more pains in this cause, than I ever will take again: Although my engaging in this and another popular cause has raised much resentment; but I think I can sincerely declare, that I cheerfully submit myself to every odious name for conscience sake; and from my soul I despise all those whose guilt, malice or folly has made my foes. Let the consequences be what they will, I am determined to proceed. The only principles of public conduct that are worthy a gentleman, or a man are, to sacrifice estate, ease, health and applause, and even life itself to the sacred calls of his country. These manly sentiments in private life make good citizens, in public life, the patriot and the hero—I do not say, when brought to the test, I shall be invincible; I pray GOD I may never be brought to the melancholy trial; but if ever I should, it will then be known, how far I can reduce to practice principles I know founded in truth—In the mean time, I will proceed to the subject of the writ. In the first, may it please your Honours, I will admit, that writs of one kind, may be legal, that is, *special writs, directed to special officers*, and to search *certain houses*, &c. *especially set forth in the writ*, may be granted by the Court of Exchequer at home, *upon oath made*

before the Lord Treasurer by the person, who asks, *that he suspects such goods to be concealed in* THOSE VERY PLACES HE DESIRES TO SEARCH. The Act 14th Car. II, which Mr. Gridley [the lawyer arguing for the legality of the writs] mentions proves this. And in this light the writ appears like a warrant from a justice of the peace to search for stolen goods. Your Honours will find in the old book, concerning the office of a justice of the peace, precedents of general warrants to search suspected houses. But in more modern books you will find only special warrants to search such and such houses specially named, in which the complainant has before sworn that he suspects his goods are concealed; and you will find it adjudged *that special warrants only are legal.* In the same manner I rely on it, that the writ prayed for in this petition being general is illegal. It is a power that places the liberty of every man in the hands of every petty officer. I say I admit that *special* writs of assistance to search *special* houses, may be granted to certain persons on oath; but I deny that the writ now prayed for can be granted, for I beg leave to make some observations on the writ itself before I proceed to other Acts of Parliament.

In the first place the writ is UNIVERSAL, being directed "to all and singular justices, sheriffs, constables and all other officers and subjects &c." so that in short it is directed to every subject in the king's dominions; every one with this writ may be a tyrant: IF this commission is legal, a tyrant may, in a legal manner, also, controul, imprison or murder any one within the realm.

In the next place, IT IS PERPETUAL; there's no return, a man is accountable to no person for his doings, every man may reign secure in his petty tyranny, and spread terror and desolation around him until the trump of the arch-angel shall excite different emotions in his soul.

In the third place, a person with this writ, IN THE DAY-TIME, may enter all houses, shops, &c. AT WILL, and command all.

Fourthly, by this not only deputies &c. but even THEIR MENIAL SERVANTS, ARE ALLOWED TO LORD IT OVER US—What is this but to have the curse of Canaan with a witness on us, to be the servant of servants, the most despicable of GOD's creation?—Now one of the most essential branches of English liberty is the freedom of one's house. A

man's house is his castle; and [whilst] he is quiet, he is as well guarded as a prince in his castle—This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient. This wanton exercise of this power is no chimerical suggestion of a heated Brain—I will mention some facts. Mr. Pew had one of these writs, and when Mr. Ware succeeded him, he endorsed this writ over to Mr. Ware, so that THESE WRITS ARE NEGOTIABLE from one officer to another, and so your Honours have no opportunity of judging the persons to whom this vast power is delegated. Another instance is this.—Mr. Justice Wally had called this same Mr. Ware before him by a constable, to answer for a breach of the Sabbath-day acts, or that of profane swearing. As soon as he had done, Mr. Ware asked him if he had done, he replied, yes. Well, then, says he, "I will [show] you a little of my power—I command you to permit me to search your house for uncustomed goods; and went on to search the house from the garret to the cellar, and then served the constable in the same manner. But to [show] another absurdity in this writ, if it should be established, I insist upon it EVERY PERSON, by 14th of Car. II., HAS THIS POWER as well as the Custom-house officers; the words are, "it shall be lawful for any person or persons authorized, &c." What a scene does this open! Every man prompted by revenge, ill-humor or wantonness to inspect the inside of his neighbour's house, may get a writ of assistance; Others will ask it from self defence; one arbitrary exertion will provoke another, until society be involved in tumult and in blood.—Again, these writs ARE NOT RETURNED. Writs in their nature are temporary things; when the purposes for which they are issued are answered, they exist no more; but these monsters in the law live forever, no one can be called to account. Thus reason and the constitution are both against this writ. Let us see what authority there is for it. No more than one instance can be found of it in all our law books, and that was in the zenith of arbitrary power, viz. In the reign of [Charles II], when star-chamber powers were pushed to extremity by some ignorant clerk of

> the Exchequer.—But had this writ been in any book whatever, it would have been illegal. ALL PRECEDENTS ARE UNDER THE CONTROL OF THE PRINCIPLES OF LAW. Lord Talbot [the Earl of Shrewsbury, an English peer of the era of William and Mary] says, it is better to observe these than any precedents though in the House of Lords the last resort of the subject.—No Acts of Parliament can establish such a writ: Though it should be made in the very words of the petition it would be void. Vid. Viner. "AN ACT AGAINST THE CONSTITUTION IS VOID." But these prove no more than what I before observed, that *special* writs may be granted *on oath* and *probable suspicion*. The Act of 7th and 8th of William III. that the officers of the plantations shall have the same powers, &c., is confined to this sense that an officer should show probable grounds, should take his oath on it, should do this before a magistrate, and that such magistrate, if he think proper should issue a *special warrant* to a constable to search the places. That of 6th of Anne can prove no more.[183]

Otis's colorful and passionate argument highlights several important themes concerning general warrants and writs. It is striking that Otis begins by specifically singling out "special writs" as valid, praising them as a comparison to the general writ, because special writs are particular "like a warrant . . . to search for stolen goods" that allow only the search of houses, specially named, in which the complainant has sworn that he suspects his goods are concealed.[184] Particularly important to Otis was that under the special writ, it is the citizen who controls one's own security: "A man's house is his castle—*and [whilst] he is quiet*, he is as well guarded as a prince in his castle."[185]

And it is this image of the citizen controlling his own fate that then becomes "annihilated" by the general writ that grants uncontrolled discretion where "bare suspicion without oath is sufficient."[186] Without judicial review or findings before a par-

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[183] James Otis, *Against the Writs of Assistance* (1761), *reprinted in* M.H. SMITH, THE WRITS OF ASSISTANCE CASE 548-55 (1978).

[184] *Id.* at 552-53.

[185] *Id.* at 554 (emphasis added).

[186] *Id.*

ticular search is authorized, the general writ makes it so that "everyone with this writ may be a tyrant."[187] And unlike special writs which, "when the purposes for which they are issued are answered, they exist no more,"[188] the general writ "live[s] forever, no one can be called to account"[189] because they are not triggered by a specific suspicion which will either be proved or disproved. In the argument's most famous line, Otis booms that ultimately the general writ "is a power [that] places the liberty of every man in the hands of every petty officer."[190] He offers as an illustration the story of Mr. Ware who, upset with Mr. Justice Wally for having ordered a constable to bring Ware before the court for profane swearing, retaliates by saying, "I will show you a little of my power. I command you to permit me to search your house [using his general writ power]."[191] Ware then carried out a search "from the garret to the cellar."[192] Ware followed up the search of Wally's home by next conducting a retaliatory search upon the constable.[193] Otis uses the example to demonstrate how the general writ's unconstrained power can be prompted by "revenge, ill-humor or wantoness."[194]

V. THINKING ABOUT *EDMOND* AND *FERGUSON* AS GENERAL WARRANT CASES

The danger of using Otis's argument to frame the dangers of general warrants is that his fervent oratory might be easily dismissed as painting a picture of events unlikely to happen today. But while Otis's apocalyptic scene of "one arbitrary exertion [of the general writ] will provoke another, until society be involved in tumult and blood!" might be a bit over the top,[195]

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[187] *Id.*
[188] *Id.*
[189] *Id.*
[190] *Id.* at 553.
[191] *Id.* at 554.
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] He reaches this bloody conclusion after postulating that the statute authorizing general writs in facts extends the power to "every person," so that anyone

his vignette of Mr. Ware's abuse of the writ is not so far fetched. In fact, the full record of the *Ferguson* case suggests that MUSC's drug testing policy was designed and implemented in a manner that Otis likely would have felt quite comfortable incorporating into his impassioned attack upon general writs.

Nurse Shirley Brown made several appearances in the *Ferguson* majority's opinion. She was the nurse who heard the news report about another county prosecuting pregnant users of cocaine and brought it to the attention of the hospital attorney.[196] She kept the files of those patients who tested positive and was the hospital staff member who coordinated the arrests of the patients.[197] Nurse Brown was also the one hospital member outside the laboratory who received police training on how to maintain a chain of custody.[198] One already senses from the majority's opinion, therefore, that Nurse Brown played a major role in the drug testing program, but an examination of the plaintiffs' evidence at trial provides a fuller context from which Nurse Brown arguably emerges as a larger-than-life crusader.

As the case manager of obstetrics at MUSC, Nurse Brown had been involved in overseeing a voluntary substance abuse treatment program for pregnant patients.[199] Convinced that the voluntary substance abuse treatment was not working,[200] Nurse Brown heard the news report about criminal prosecutions and called it to the attention of the hospital's attorney, who then contacted the prosecutor's office.[201] After a joint task force met and the law enforcement members of the task force drew up the program's protocol, Nurse Brown became the key figure at the hospital for implementing the policy.[202] She

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could conduct a search of another person's home.

[196] *Ferguson*, 532 U.S. at 70-71.

[197] *Id.* at 71.

[198] *Id.* at 82 & n.19.

[199] Petitioner's Brief at *2, Ferguson v. City of Charleston, 532 U.S. 67 (2000) (No. 99-936), *available at* 2000 WL 728149.

[200] *Id.* at *2 & *18 n.13 (stating that no empirical basis existed for Nurse Brown's perception since no systematic tracking system was in place).

[201] *Id.* at *2-3.

[202] *Id.* at *3.

kept a Rolodex in her office of patients who tested positive[203] and was the person who would "call the police, file a complaint, inform [the police] when a patient who had tested positive was about to leave the hospital, and help coordinate the woman's in-hospital arrest."[204]

Not surprisingly, then, Nurse Brown figured prominently in the patients' descriptions of their arrests: telling a patient that she was to be discharged, when in fact the police were about to enter and remove her in handcuffs to a waiting police car; arranging for the arrest of a patient still bleeding from childbirth, who was handcuffed while still in her hospital gown and taken away despite her pleas to Nurse Brown of "please, what could I do to stop this or could you help me," pleas to which Nurse Brown merely replied, "[you will] be locked up;" refusing a patient's request to arrange for child-care for her son before entering the drug treatment program, saying that the only choice was to enter the treatment program immediately or be arrested.[205] The plaintiffs' testimony established a picture of patients being dragged off in handcuffs, many still bleeding or vomiting and denied the chance to contact their families.

Moreover, these arrests were taking place in a context with disturbing racial overtones. MUSC was the only city hospital with a predominantly African-American population and was the only hospital subject to the drug testing program that ultimately was devised with the cooperation of the prosecutor's office and the police. Of the thirty women arrested under the policy, twenty-nine were African-American.[206] Evidence at trial indicated that these results were not simply a result of African-American patients using drugs at a higher rate, but from selective testing of the types of drugs and the patients.[207]

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[203] *Id.* at *14.

[204] *Id.* at *16.

[205] *Id.* at *7-10.

[206] *Id.* at *12-13. Some dispute existed as to whether one of the women was to be considered African-American, in which case the result would be twenty-eight of thirty arrests were of African-American women. *Id.* at *13 n.9. Importantly, however, Nurse Brown considered the patient to be African-American. *Id.*

[207] *Id.* at *12. The trial court found that the statistical analysis demonstrated a prima facie showing of disparate impact discrimination based on the testing for

Both Nurse Brown's own testimony and the plaintiffs' testimony also raised the question of whether the program's considerable discretion was being exercised even-handedly between African-American and white patients: Nurse Brown, for instance, called the prosecutor's office to ask for a second-chance for a white patient who otherwise should have been arrested under the program's protocol;[208] a witness testified that Brown raised the option of sterilization with African-American patients who tested positive and not with white women in the same position;[209] and Brown noted on white patients' charts if their partners were black (Nurse Brown stated at trial that she believed interracial relationships were "against God's way").[210]

In short, the plaintiffs' case could be used to make an argument that the program placed Nurse Brown more in the role of Nurse Ratched than Nurse Nightingale as she conducted the drug testing program, and that the story of MUSC's drug testing program was a classic vignette of the evils of a general warrant that Otis so vividly described. Nor to make this case, does one have to posit that Nurse Brown had a sinister motive in how she conducted the program—she very well may have been motivated purely by the desire to fight the problem of "crack babies"—but it was her ability to implement the policy as she saw fit that allegedly allowed the situation to become one of unbridled discretion gone awry. Justice Brandeis's words in his famous *Olmstead* dissent seem almost tailor-made to the plaintiffs' case: "The greatest dangers to liberty lurk in insidious encroachment by men [and women] of zeal, well-meaning, but without understanding."[211]

Importantly, too, *Ferguson*'s facts highlight the difficulty of

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cocaine rather than for drug use generally. *Id.* The percentage of African-American pregnant patients testing positive for all drug use (68%) was considerably less than for those testing positive only for cocaine (90%). *Id.*; *see also* Ferguson v. City of Charleston, 186 F.3d 469, 481 (1999).

[208] Petitioner's Brief, *supra* note 199, at *12.

[209] *Id.* at *13 n.10.

[210] *Id.* at *13

[211] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

relying upon "democratic control" to control suspicionless programs like MUSC's drug testing program.[212] The women subjected to the program generally were poor patients seeking treatment at the city's public hospital, a population segment unlikely to have much of a political voice. Moreover, the program did not originate from a legislative mandate or gubernatorial task force established by a systematic policy-making process, but from a determined hospital nurse who was able to engage the attention of the local police and prosecutor's department. Even once devised, their policy underwent no type of legislative or state-level executive review, let alone judicial review, but essentially was a local crusade using law enforcement resources, without oversight, against what they perceived to be a burning social need. The bottom line, in other words, was that no matter how well-meaning Nurse Brown and the police were, unless the judiciary was willing to review the program as a "policy magistrate," the patients subjected to the program had no meaningful way to raise their Fourth Amendment concerns and to test the policy's implementation on a day-to-day basis.

While *Edmond*'s record does not raise the immediate concerns that were present in *Ferguson* over how it was being implemented in the field,[213] the narcotics checkpoints still resonate with Otis's criticisms of general warrants. One of Otis's primary concerns was that general warrants "live forever" because "it is perpetual; there is no return" and because no suspicion exists to prove or disprove.[214] The citizen, therefore, loses his ability to keep the government from stopping him "whilst he is quiet," because the government can substitute its own judgment for the need to stop the "quiet" citizen rather than having to show individualized suspicion of wrongdoing.[215]

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[212] *Ferguson*, 532 U.S. at 96 (Scalia, J., dissenting) (objecting to the Court creating "a Fourth Amendment jurisprudence" in this context immune from "democratic control").

[213] The drivers who filed a class action lawsuit challenging their stops claimed that the limits in the police directives had not been followed, but they agreed to stipulate that the checkpoints were operated according to the directives for the purposes of the preliminary injunction decision. *Edmond*, 531 U.S. at 35.

[214] Otis, *supra* note 183, at 553-54.

[215] The Supreme Judicial Court of Massachusetts in holding narcotics check-

Judge Posner, in the lower court opinion striking down the narcotics checkpoints, noted the danger that if a general law enforcement purpose could satisfy the Fourth Amendment, "[i]n high-crime areas of America's cities it might justify methods of policing that are associated with totalitarian nations."[216] Posner even posited that if the narcotics checkpoints were upheld, the same principle could allow "the government [to] set up a metal detector outside each person's home and require[] the person to step through it whenever he entered or left, in order to determine whether he was carrying a gun for which he lacked a permit."[217] As we have seen, Justice O'Connor's opinion in *Edmond* likewise stated that no meaningful limit could be articulated "to prevent such intrusions from becoming a routine part of American life" if a general law enforcement purpose was allowed to suffice.[218]

Perhaps most importantly, the Court in *Edmond* clearly took the decision of what constituted a "special need" and placed it firmly within the judiciary's control. Unlike *Ferguson*, where those subjected to the search were politically weak and the political mechanisms for overseeing the hospital's drug testing uncertain, the checkpoint in *Edmond* arguably would have been subject to overview at the ballot box. After all, the aggrieved populace in *Edmond* was the entire driving citizenry. A plausible argument could be made, therefore, that if roadblocks were an affront to the citizenry, "the people may throw out of office those who adopted it."[219]

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points invalid under the state constitution drew an analogy to the writs of assistance, arguing that, "Roadblocks established for the purpose of interdicting drugs and other contraband essentially give to the police the same powers with respect to individuals in their automobiles as the writs of assistance granted to the British officials with respect to individuals in their homes." Commonwealth v. Rodriguez, 722 N.E.2d 429, 435 (Mass. 2000).

[216] Edmond v. Goldsmith, 183 F.3d 659, 662 (7th Cir. 1999).

[217] *Id.* at 664. Judge Easterbrook in his dissent, on the other hand, believed that automobile checkpoints under the Supreme Court's cases constituted a separate genre of Fourth Amendment analysis and could be distinguished from the metal detector example on that basis. *Id.* at 669 (Easterbrook, J., dissenting).

[218] *Edmond*, 531 U.S. at 42; *see also supra* note 114 and accompanying text.

[219] *Edmond*, 183 F.3d at 671 (Easterbrook, J., dissenting). Judge Easterbrook also made the argument that roadblocks might actually promote privacy and less intrusive government actions by making unnecessary more offensive tactics for

By insisting in *Edmond* that the Fourth Amendment norm truly was one of individualized suspicion and could only be deviated from in situations directly implicating special needs (like immediate highway safety concerns), the Court insulated the individual's right to be free from government intrusion "whilst he is quiet" from democratic override (just as a legislature, for example, could not vote to dispense with the warrant requirement for searches of homes of suspected drug dealers). In doing so, the Court moved suspicionless programs away from executive and legislative discretion granted to "petty officers" and towards a Fourth Amendment that constrains discretion by the need to either show suspicion of wrongdoing or by demonstrating the existence of a compelling justification for dispensing with individualized suspicion. Moreover, and most importantly for dealing with the concerns that James Otis voiced in 1761, the *Edmond* Court gave support to the principle that the judiciary as "policy magistrate" would scrutinize the government's evidence to decide whether the "special need" actually existed to justify departure from the Fourth Amendment's norm of traditional probable cause.[220]

VI. CONCLUSION

The Court's impulse in *Camara* to bring administrative searches like housing inspections within the Fourth Amendment's protection was a noble one very much in accord with the Amendment's original concerns about general warrants. Justice White explained that, "the basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials . . . . 'When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.'"[221] The idea that even a

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detecting narcotics use that are clearly permissible under the Fourth Amendment, such as the use of informers or searching one's trash. *Id.* (Easterbrook, J., dissenting).

[220] *Edmond*, 531 U.S. at 46-47.

[221] *Camara*, 387 U.S. at 528-29 (quoting Johnson v. United States, 333 U.S.

housing inspector's entry into the home must be subjected to judicial oversight was a concept, therefore, that comfortably fit within the Fourth Amendment's historical concern with general warrants.

As *Camara*'s reasonableness balancing test spawned the later "special needs" cases, however, the holding appeared to have opened the door to unintended mischief. Rather than bringing government intrusions within the Fourth Amendment and subjecting them to rigorous judicial review, the reasonableness balancing test seemed headed in the direction of giving the government leeway to engage in suspicionless searches based on policy judgments that the courts were hesitant to scrutinize. The initial string of cases in which the Court approved the government's justification for checkpoints and "special needs" or "administrative" searches—cases like *Skinner*, *Von Raab*, *Acton*, *Burger* and *Sitz*—created consternation that the Court was giving the government considerable latitude to engage in suspicionless programs even where significant criminal consequences often followed. The Court's language in these cases spoke comfortingly of "closely guarded" exceptions to individualized suspicion, but the scant record supporting the government's justification in cases like *Von Raab* seemed to indicate that the Fourth Amendment's "special needs" determination was largely one of the judiciary deferring to the other branches' judgment.

Chandler gave some hope that the Court would in fact live up to its promises, but it was not until *Edmond* and *Ferguson* that the Court embraced the role of "policy magistrate." In both cases, the majority showed a willingness to require the government to justify its "special need" as a need outside the realm of general law enforcement, and the Court actively tested the justification against the evidence. Like a magistrate deciding whether to issue a search warrant, the Court asked questions and probed the record for answers before deciding whether the government had met its burden of proving why it should not be required to show individualized wrongdoing.

The question for the future is whether the Court will con-

10, 14 (1948)).

tinue in its role as an active "policy magistrate" or whether *Edmond* and *Ferguson* merely will become cautionary tales to the government. Both cases hold the possibility that clever government tinkering with labels and the ordering of events in a suspicionless search program could satisfy a formalistic reading of their holdings. When these cases arise, they are likely to be even more challenging because they will require the Court in its role as magistrate to go even further in its fact finding and enter the uncomfortable terrain of labeling government actions a "ruse" or a "pretext."[222]

In looking for the constitutional courage to take that step, the Court should recall that the role of judicial oversight harks back to the concerns over general warrants that gave rise to the Fourth Amendment. The Framers feared discretionary authority, the ability of government agents to decide on their own to disturb a citizen "whilst he is quiet." Today, the government's ability to disturb the citizen's "quiet" has grown in technological and manpower terms far beyond what the Framers ever imagined. Undoubtedly, the challenges of a post-9/11 world will force society to confront difficult questions of how to adapt law enforcement resources to meet new problems, but in confronting those questions, we also must not forget the

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[222] The Court's decision in Illinois v. Lidster, 124 S. Ct. 885 (2004), does not necessarily demonstrate a retreat from the principles of *Edmond* and *Ferguson*. The *Lidster* majority upheld an "information-seeking highway stop" at which police stopped motorists and handed out flyers asking for information about a hit-and-run accident that had left a 70 year-old bicyclist dead. *Lidster*, 124 S. Ct. at 888. The majority's basic distinction of *Edmond* was a reasonable one—that the stop's "primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask . . . for their help . . . ."—and on that basis would not undercut *Edmond*'s holding. *Id.* at 889. The majority opinion, however, also contained some worrisome language that may suggest that the Court is retreating from treating checkpoints as requiring rigorous Fourth Amendment scrutiny. At various points, for instance, the majority stated that "[t]he Fourth Amendment does not treat a motorist's car as his castle" and minimized the intrusion involved with stopping a car. *Id.* Certainly, the concurring opinion's call for remanding the case to the state court to better develop the record as to how the police decided where to place the information stop and what alternatives were considered was more consistent with the Court's oversight responsibilities under *Edmond* and *Ferguson*. *See id.* at 891 (Stevens, J., dissenting).

historical wisdom of those who learned from living in a world of general warrants.

OVERCOMING HIDDENNESS: THE ROLE OF INTENTIONS IN FOURTH AMENDMENT ANALYSIS

Daniel Yeager[*]

> Sweet Mephostophilis, so charm me here / That I may walk invisible to all / And do whate'er I please unseen of any.[1]

I. INTRODUCTION

At the beginning of some research I was doing five years ago on the subject of pretexts, I tapped in the name "Whren" in a Westlaw search and over 1000 citations appeared. This struck me as a lot of play for a case that had been law for just three years.[2] I remember then telling myself that if I wanted to continue with the project, I had to assume two things: first, that most of which was written on point would, if confronted, reveal itself to be unhelpful; and second, that if in the future I wanted to write about something about which so much had been said, I would, well, have to remind myself of what I'd told myself earlier. Make what you will of this version of Harold Bloom's "anxiety of influence."[3] Still, while I admit to not being quite up to tapping in the word "privacy" into Westlaw, I don't need to do that to get a sense of its centrality in legal discourse. All I need to do is look on my desk, which has an off-

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[1] CHRISTOPHER MARLOWE, THE TRAGICAL HISTORY OF THE LIFE AND DEATH OF DOCTOR FAUSTUS, act 3, scene 1, lines 11-13 (Sylvan Barnet ed., Penguin Books USA, Inc. 1969) (1624).

[2] *See* Whren v. United States, 517 U.S. 806 (1996).

[3] HAROLD BLOOM, THE ANXIETY OF INFLUENCE: A THEORY OF POETRY (2d ed. 1997).

print I just received from *Legal Studies Forum*, entitled: *Law, Instrumental Music, and Dance: Reflections of a Common Culture*,[4] which, despite drawing thoughtful comparisons between, for example, Stravinsky's *Le Sacre Du Printemps* and *Macpherson v. Buick Motor Co.*, also contains a five-page disquisition on privacy, the relevance of which I am struggling to make out. I guess perhaps I *could* make it out if I were willing to work that hard, but more important for my purposes here is that privacy is an enormous industry: claiming it (one could say exploiting it), invading it, and not least of all, writing about it. Indeed, privacy is a phenomenon about which most everyone is inspired to jot down a position eventually. Only last week did I notice that the Barnes & Noble near my house in San Diego has on display a book published in 1997 called *The Right to Privacy*, co-authored by President Kennedy's daughter Caroline, who argues therein that "privacy is under siege."[5] There you have it.

I should not, however, complain about over-participation in the privacy industry. To do so would be to forget a remark that I once heard Yale Kamisar make on an Association of American Law Schools (AALS) panel years ago, where he said, only partly in jest, that *Miranda v. Arizona*[6] had helped him put three of his kids through college. I don't know if any of us can or will be able to say the same about *Katz v. United States*,[7] but I think we could reach agreement that it has given us, and will most likely continue to give us, more than a little to chew on. I propose that at a minimum, we be grateful that E.L. Godkin,[8] and more importantly, Warren and Brandeis,[9] appropriated Judge Cooley's innocuous description of a right to "personal

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[4] Michael L. Richmond, *Law, Instrumental Music, and Dance: Reflections of a Common Culture*, 27 LEGAL STUDIES FORUM 783 (1999).

[5] ELLEN ALDERMAN & CAROLINE KENNEDY, THE RIGHT TO PRIVACY xiii (1995).

[6] 384 U.S. 436 (1966).

[7] 389 U.S. 347 (1967).

[8] E.L. Godkin, *The Rights of the Citizen: IV.—To His Own Reputation*, 8 SCRIBNER'S MAG. 58, 65-67 (1890).

[9] Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195 (1890).

immunity"[10] from assault and battery and converted it somehow into a highly generalized "right to be let alone." That we are able to convene here to discuss it—that Professor Clancy can throw a conference like this every year and put his guests up in the comfort he does—indicates that the Fourth Amendment is, contrary to a most popular myth, far from dead. In fact, if it *is* dead, someone should tell Wayne LaFave: his search-and-seizure treatise is in its third edition, is up to five volumes, and has, I suspect, helped make him a wealthy man by academic standards.

This Article rehearses a response to the problems posed to and by the Supreme Court's attempts to work out the meaning and operation of the word "search." After commencing Part II by meditating on the notion of privacy, I take up its relation to the antecedent suspicion or knowledge that Fourth-Amendment law requires as a justification for all privacy invasions. From there, I look specifically at that uneasy relation in Supreme Court jurisprudence, which has come to privilege privacy over property as a Fourth Amendment value. From there, Part III reviews the sources or bases that can tell us what can *count* as private: 1) the positive laws of property, tort, crime, and contract; 2) laborious questioning of the sort performed by Chris Slobogin; and 3) the routine versus nonroutine nature of the governmental surveillance in question (let's call this the O'Connor position from *Florida v. Riley*,[11] recently resurrected in *Bond v. United States*[12]). To the extent that the routine nature of some intrusive actions does not disqualify them as unacceptably intrusive, Part IV suggests an alternative method for determining what constitutes a search. In order to establish that the intentions of both search victim and police should play an important role in this determination, I take some care to look at the unhappy role that intentions currently play in Supreme Court jurisprudence, particularly in the context of so-

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[10] THOMAS M. COOLEY, COOLEY ON TORTS 29 (2d ed. 1888) ("The right to one's person may be said to be a right of complete immunity: to be let alone.").

[11] 490 U.S. 1014 (1989).

[12] 529 U.S. 334 (2000).

called "pretexts." After mapping my criticisms of the Court's analysis of intentions in that context onto the question of what constitutes a search, I am able to take a position on the extent to which spying (as opposed to more coercive police actions) should be regulated by the Fourth Amendment.

II. Privacy, Property, and the Function of Antecedent Suspicion

When Wittgenstein wrote that "[t]he soul is impersonal[,]"[13] he was commenting on a then rather new concern of epistemology: the notion of privacy. Skepticism's concern with the limits of knowledge was no longer just with identifying the grounds on which we may make claims about the material world. It had branched out inexorably into a concern with identifying the grounds on which we might make claims about how things are with others. This opened up a whole new problem for skeptics: it was no longer a matter of telling (knowing) what's real from what is fake, dummy, toy, pretend, counterfeit, illusion (or delusion); skepticism had trained itself on telling (knowing) how things are with others, a matter of peeking, or at least feeling an urge or need to peek, into their inner lives. Whether, for example, I can "know your pain" is a question quite apart from whether I can know that you exist at all. Even if we are twins or have somehow had identical experiences, still I cannot actually *know* your pain: the limits of my knowledge owe to the privacy of your own experience, here, the privacy of your own body. This concern with attempts to penetrate privacy or overcome somehow our separateness makes responding to one another unmediated by knowledge, since I cannot after all really *know* how things are with you, not the way I can know, say, a formula or a fact. But though I cannot know your pain, I nonetheless *can* respond to you when you tell me that you are in pain, though my response is in no way mediated by what I know about what you are experiencing. In

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[13] Stanley Cavell, The Claim of Reason: Wittgenstein, Skepticism, Morality, and Tragedy 361 (1979).

other words, the fact that you are to an extent hidden to me may prevent my knowing what you are experiencing, but it does not prevent my responding to you when you tell me what you are experiencing (here, that you are in pain). I can on the one hand acknowledge it, as in, "I've done all I can for you," "the serum is being flown in by plane," or, just, "I know." On the other hand, I can refuse to acknowledge your pain, which we could count as a repudiation of you, of your situation. These responses or refusals to respond to you, because they are based on a realm of knowing that has nothing at all to do with certainty, are manifestations of the problem of privacy. Indeed, that our separateness or hiddenness from one another inevitably creates problems between us—that you are in your body and I am in mine—is constitutive or definitive of privacy.

I know I was not invited to the University of Mississippi to give a disquisition on the body—what Emerson calls that giant I carry around with me. But I do anticipate a payoff in comparing the notion of privacy that precludes our relation to one another from being based on knowledge with the notion of privacy that ruminated in the Supreme Court from 1886 to 1967 and has been limping along ever since. In other words, privacy is, by definition, a problem. Not so much the sort of problem that Bill Stuntz wrote about almost a decade ago when he complained that the right to remain hidden from police is wrongfully privileged over the right to be free from being pushed around by them.[14] Rather, privacy is a problem because, while it creates a tremendous blockage between us, we remain nonetheless responsible for taking positions, making calls, and passing judgment on what others do or fail to do. This must be what Judge Posner is troubled by in his *Economics of Justice*, where he writes that privacy in its secrecy (not seclusion) mode is nothing more than a license to manipulate and defraud others by keeping them in the dark about what you really are.[15] In other words, it is my point that privacy is

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[14] William J. Stuntz, *Privacy's Problem and the Law of Criminal Procedure*, 93 MICH. L. REV. 1016 (1995).

[15] RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 271 (1981).

a problem not because it is a less serious intrusion than is low-level violence, but because it is read on a different plane altogether than being pushed up against a wall, handcuffed, or placed in the backseat of a police cruiser. Privacy is a problem because you could be deceiving me, or misunderstanding me, or I could take what you have done to be on purpose when it could really just be an accident (or what I take to be just an accident really could have been done on purpose). How should I respond to you when what you say could be plagued with various modes of insincerity or when what you do could be extenuated by an excuse? In no case can I really *know* whether whatever is between us contains deception or misunderstanding; nor can I necessarily know whether the harm you've done me was inadvertent as opposed to intentional. And if my response to what really happened (is happening) is predicated on what I know, then *that* is what I do: I treat the problem as one of knowledge, and so I may do nothing when perhaps doing something is called-for; but since I condition what I do on what I know, I feel forced to do nothing while I fiddle around perfecting my knowledge.[16] But doing nothing is also something for which I am responsible and something which I must be prepared to elaborate when demanded to do so by someone in a position to question me. Certainly it is *a* response for me to say: "But I didn't know, and since what I do hangs on what I know, I couldn't do anything." But it is just *a* response. It may or may not in a given situation get me off the hook for acting or taking a certain position when I should not have, or for refusing to take a

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[16] STANLEY CAVELL, *The Avoidance of Love: A Reading of King Lear*, *in* MUST WE MEAN WHAT WE SAY? 329-30 (1969).

> That couple over there, drinking coffee, talking, laughing. Do I believe they are just passing the time of day, or testing out the field for a flirtation, or something else? In usual cases, not one thing or another; I neither believe nor disbelieve. Suppose the man suddenly puts his hands to the throat of the woman. Do I believe or disbelieve that he is going to throttle her? The time for that question, as soon as it comes to the point, is already passed. The question is: What, if anything, do I do? *What I believe hangs on what I do or do not do and on how I react to what I do or do not do.*

Id. at 329 (emphasis added).

position or for not acting when I should have.

This is all in the hope of sketching out that privacy is a physical limitation that creates more than physical distance between us. It cannot be overcome by "inferences" or any other means of denying what John Henry Wisdom—Wittgenstein's greatest student (apologies to Elizabeth Anscombe)—called "the otherness of others[.]"[17] Privacy is a condition that defines relationships, a condition of community that may explain, for example, that feeling of loneliness we have all experienced when we find others inaccessible or unknowable, or when we see ourselves in the same way.[18] You can be on guard against some of the upshots of privacy's difficulties: for instance, don't believe people whom you have reason to disbelieve. This is not to say, of course, that one should always be on guard: "why believe anyone (ever)?" is borderline nonsense.[19] Indeed, only the worst sort of skeptic—like Othello or like Henry Fonda in Preston Sturges's *The Lady Eve* (1941)[20]—would be so full of doubt (so obsessed with evidence) that they would believe in a silly handkerchief or a photograph over the flesh and blood

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[17] JOHN WISDOM, OTHER MINDS 217 (1952).

[18] J.L. AUSTIN, *Other Minds*, *in* PHILOSOPHICAL PAPERS 112 (J.O. Urmson & G.J. Warnock eds., 3d ed. 1979).

> All three varieties of worry may arise, and often do, in connexion with the actions of persons whom we know very well. Any or all of them may be at the bottom of the passage from Mrs. Woolf: all work together in the feeling of loneliness which affects everybody at times.

Id. (footnotes omitted).

[19] *Id.* at 115.

> The question, pushed further, becomes a challenge to the very possibility of 'believing another man', in its ordinarily accepted sense, at all. What 'justification' is there for supposing that there is another mind communicating with you at all? How can you know what it would be like for another mind to feel anything, and so how can you understand it? It is then that we are tempted to say that we only mean by 'believing him' that we take certain vocal noises as signs of certain impending behaviour, and that 'other minds' are no more really real than unconscious desires.

Id.

[20] WILLIAM SHAKESPEARE, OTHELLO; THE LADY EVE (Paramount Pictures 1941).

woman who loves them. And look what happened to them. But even for the person who doubts only when there are good grounds for doubt, there will be no rescue from that nagging sense both of a need for other people and at once a separateness from them.

Hiddenness prevents knowledge, which in turn prevents or destabilizes our moral judgments, at least to the extent that they are based on knowledge or some version of it. If you want to know what someone is up to, ordinarily the best thing to do is to commune with them, ask them, or perhaps even behold them. But when you have reason to believe that they are deceiving you, or that they will deceive you, or when you are afraid of tipping them off, then asking them what they are up to, or buddying up to them or hanging around them are all unattractive options. In these situations, their hiddenness must be overcome through one of two ways: stealth or coercion. In other words, if they will not let us into their private worlds, then we must let ourselves in. But to do that—to invade their privacy, *legally* speaking—you must already have a certain amount of knowledge about what they are up to, that is, you must be in a position *already* to make a moral judgment about them. But of course if you are already in such a position, then your need to overcome their hiddenness is weak, since you have already overcome it.

Put in Fourth Amendment terms, you cannot violate someone's privacy unless you have a pretty good idea about what you will find if you do. This explains, for example, why search warrants only infrequently turn up no evidence and therefore only infrequently turn into acquittals for the targets of the searches. Don Dripps put it this way in his discussion of *United States v. Leon*[21] nearly two decades ago:

> [J]udicial hostility to the exclusionary rule, although doubtless present in certain cases, is not the only explanation for a low rate of lost convictions. The second fact about search warrants—their surprising accuracy in predicting the location

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[21] 468 U.S. 897 (1984).

> of criminal evidence—provides an objective indication that the low suppression rate is consistent with the thesis that most warrants are validly issued.
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> In the [National Center for State Courts] study, the authors measured the frequency with which warrant searches resulted in the seizure of evidence described in the warrant, based on the number of returns filed. In six of seven cities, the proportion of searches that discovered at least some of the evidence named in the warrant ranged from 74% to 89%. That record, reflecting the best available information, is strikingly impressive.[22]

Dripps's point here has been proven by a much more recent study conducted by my colleague Larry Benner, who analyzed a random sample of search warrants issued in the San Diego Judicial District in 1998.[23] Focusing on the 122 search warrants for narcotics (49.2% of all cases), Benner found that, of those warrants that were actually executed, some drug was recovered in 73.9% of the cases[24] and in an even higher percentage of cases—a whopping 91.7%—where drug-sniffing dogs were deployed.[25] Let's accept, therefore, that police who search by warrant have a pretty good idea about what they will find. This "pretty good idea" is what the law calls "probable cause," which while not enough to convict anyone of anything, does put police in a position to get by force, if necessary, the extra evidence that can turn a justified invasion of privacy (based on probable cause that crime has occurred) into a conviction (based on proof beyond a reasonable doubt that crime has occurred). The rub, therefore, at least as I see it, is getting from a mere hunch to the "reasonable suspicion" (which by Bill Stuntz's extrapolation, requires about a one in four chance that

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[22] Donald Dripps, *Living with* Leon, 95 YALE L.J. 906, 924-25 (1986) (footnotes omitted).

[23] Laurence A. Benner & Charles T. Samarkos, *Searching for Narcotics in San Diego: Preliminary Findings from the San Diego Search Warrant Project*, 36 CAL. W. L. REV. 221, 224 (2000).

[24] *Id.* at 249.

[25] *Id.* at 252.

crime is afoot)[26] or probable cause that would justify penetrating the privacy of the target of your suspicion. In other words, when police have low or no suspicion that crime is afoot, but they are nonetheless interested in probing further into the matter, the Fourth Amendment constrains what they may do *with no justification at all* in order to *get* the necessary suspicion or knowledge that will justify their intruding further into the matter and the privacy of their target.

This difficulty for police—that the lawfulness of their intrusions or surveillances are determined by or tied to how much they know about you—makes good sense, too. Hiddenness is not just a sort of problem in that you become defined by, in a sense at least, being unknowable. It is for that very reason also a sort of accomplishment. Some people, some of whom are criminals, are better at remaining hidden than others. I am reminded here of Chief Justice Warren's quip in *Lewis v. United States*, where he wrote that the unsavory uses of undercover practices and electronic bugging are largely directed at the detection, apprehension, and conviction of morals offenders involved in vice, liquor, or narcotics—activities where "[t]he participants in the crime enjoy themselves" and so are having too much fun to rat each other out.[27] It is nearly impossible to exist in a community and block others from picking up a lot about us; our simply being there in the public observable world where what we say, do, and refrain from saying and doing manifests more about us than we sometimes want to reveal or think we are revealing. Someone who reveals nothing or next to nothing at the level of action gives law enforcement the perception that penetrating his or her privacy is necessary not to confirm what they know about him or her already, but instead, in order to know anything at all. People so good at remaining hidden may be deceiving us as all so-called "private"

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[26] Stuntz, *supra* note 14, at 1023.

[27] Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642, 1706 n.206 (quoting Lewis v. United States, 385 U.S. 206, 210 n.6 (1966) (quoting Model Penal Code § 2.10 commentary at 16 (Tentative Draft No. 9, 1959)).

people do. ("He is a private person" is a phrase that Richard Posner insists has a pejorative sense).[28] But leaving no trail whatsoever is no mean feat. This may be what Scott Sundby means when he says that the government must trust people against whom it has insufficient amounts of suspicion: that they have achieved a sort of hiddenness that deserves protection, not bashing.[29] I take Sundby to be asking not, for example, whether Greenwood had privacy in his opaque garbage bag set by curbside for pickup, but rather, what Laguna Beach police were doing rummaging through it.[30] Of course hiddenness rarely inspires trust, though it is in the end a rather neutral fact in that it is hard to know what to make of it.

Hiddenness is a problem: when we make judgments, we cannot always rely on knowledge, so probable cause allows us to take positions on who has done what and under what circumstances. It bears repeating that normally when people seem hidden to us, if we are not in a position to commune with them, we can apply pressure to them: ask them what they're up to. Here, either we do not have enough suspicion (hiddenness blocks us from getting it) or our revealing our interest in what they're up to will cause them to withdraw or close up shop. And what will intruding on others' privacy tell us? In other words, normally our concern with privacy is with how things are with other people (sincerity): the evidence of how things are with them may be in conflict with the real state of affairs ("you *seem* or *look* or *appear* to be nice"). If I cannot count on your forthrightness, that is, if I cannot count on you to reveal yourself in a non-manipulative way, then gathering more evidence without your co-operation, say, by talking to co-workers, an ex, or a neighbor, is meant to overcome problems of sincerity (or, I should say, insincerity) by gathering evidence that you do not or will not voluntarily provide. That evidence, in turn, is supposed to reveal something about your intentions (your actions

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[28] POSNER, *supra* note 15, at 272-73.

[29] Scott E. Sundby, *"Everyman"'s Fourth Amendment: Privacy or Mutual Trust Between Government and Citizen?*, 94 COLUM. L. REV. 1751 (1994).

[30] *Id.* at 1790-93.

in prospect) or completed actions that you would not own up to if asked. As an aside, there are good bases for not coming clean in the process or context of being accused, even when the accuser is a position to question us: as Susan Bandes recently observed, confessing to crime rarely leads to reconciliation. Instead, suspects who confess are uniformly charged with and convicted of more serious offenses than those who retain bargaining leverage by forcing police to demonstrate their guilt through investigative strategies other than interrogation.[31]

III. The Domain of the Private in Constitutional Criminal Procedure

A. Was Katz *All That New?*

What special problems, then, does privacy (hiddenness) pose to community's goal of providing protection for persons and their property? Certainly the Supreme Court recognizes that privacy is both a good and a problem. It has emphasized for over a century the importance of privacy to a fully flourishing life,[32] yet at the same time it has resisted converting all surveillance into what the Fourth Amendment calls a "search" that would as such need to be justified by some quantum of antecedent reasonable suspicion or probable cause.[33] Not until the 1960s, however, did the Court begin to worry to death the conflict posed by an individual's right to remain hidden and a governmental need to overcome hiddenness as a condition of protecting persons and their property.[34]

As the Warren Court worked its way through the 60s, the

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[31] Susan Bandes & Jack Beermann, *Lawyering Up*, 2 Green Bag 2d 5, 12 (1998).

> Studies show that suspects who confess are more likely to have charges filed against them, less likely to have charges dropped, and less likely to receive a plea bargain, that they receive worse deals if they do bargain, are more likely to be convicted at trial, and more likely to be convicted of serious charges.

Id.

[32] Boyd v. United States, 116 U.S. 616, 630 (1886).

[33] California v. Ciraolo, 476 U.S. 207, 213 (1986).

[34] *See* discussion *infra* notes 36-41 and accompanying text.

doctrines of incorporation and nonretroactivity gave it repeated opportunities to review criminal convictions. In those decisions, as scientific investigative techniques emerged as constitutionally superior to bullying (or what Don Dripps calls the arc lamp and the rubber hose),[35] the Court overruled its then half-century-old mere-evidence rule, which for no good reason had threatened to keep the identity of criminals hidden. *Warden v. Hayden*[36] held that clothing worn by the suspect in the armed robbery of a taxistand could not be described as fruit, instrumentality, or contraband, but the clothing was nonetheless just the sort of evidence for which police (from then on) could search for and seize.[37] The kernel of Justice Brennan's majority opinion is his rejection of a so-called "primary right theory."[38] This primary right theory was oweable to *Gouled v. United States*.[39] *Gouled* had invalidated the seizure of unexecuted form contracts, which had been described by the lower courts as non-seizeable, since they were neither fruit nor instrumentality or contraband.[40] In other words, *Gouled* prohibited the search for and seizure of purely evidentiary materials. According to *Gouled*'s primary right theory, the government and the search victim would compete over whose interest in the seized property was superior.[41] If the government had the superior interest, then the government could admit the property at trial

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[35] Donald A. Dripps, *Beyond the Warren Court and Its Conservative Critics: Toward a Unified Theory of Constitutional Criminal Procedure*, 23 U. MICH. J.L. REFORM 591, 632 (1990).

> [T]he warnings have contributed generally to a more humane police culture, and they surely impose some limits on police tactics in specific cases. The reading of rights affects the questioner, even if it glances off the suspect. Only a corroded conscience could live with reading the *Miranda* card by the glare of the arc lamp. And the law-abiding police interrogator must tread rather lightly; too much pressure and the suspect may invoke the right to counsel.

Id. (footnote omitted).

[36] 387 U.S. 294 (1967).

[37] *Hayden*, 387 U.S. at 300-01.

[38] *Id.* at 303-04.

[39] 255 U.S. 298 (1921).

[40] *Gouled*, 255 U.S. at 305.

[41] *Id.* at 309.

and retain it afterwards. If the search victim had the superior interest, then he or she could repossess the property before trial and thereby effect its exclusion.

In Justice Brennan's view, the primary-right theory had lost much of its force as early as 1914, when the remedial structure of the Fourth Amendment changed.[42] Until then, aggrieved persons obtained redress for illegal searches by trespass and replevin actions, which were dependent on proof of a superior property interest, but were unrelated to *how* government obtained the property.[43] That remedial structure, Brennan continued, was discredited by the emergence of the privacy model, which had changed both the meaning and consequences of governmental illegality.[44] Therefore, to declare a search unreasonable after *Hayden* means that the evidence so derived is inadmissible at the search victim's trial, even absent the right to repossess it, as with contraband. Contrariwise, the government now can introduce evidence at trial even absent a superior interest, as with goods stolen from an unidentified victim.[45]

This shift in remedy, Brennan wrote, ended the contest over property interests.[46] For example, in 1920, in *Silverthorne Lumber Co. v. United States*,[47] a father and son who ran a lumber yard had conspired to defraud the United States by charging a government-controlled railroad for boards not received.[48] Brennan reads Justice Holmes's vague opinion in *Silverthorne* to say that, as victims of an unjustified search of their premises, the Silverthornes could replevy their documents pre-trial.[49] Brennan adds that while the objectionable evidence

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[42] *Hayden*, 387 U.S. at 304-05 (discussing Weeks v. United States, 232 U.S. 383, 393-396 (1914)).

[43] *Id.* at 303-05.

[44] *Id.* at 305-06.

[45] *Id.* at 307 n.11.

[46] *Id.* at 305.

[47] 251 U.S. 385 (1920).

[48] Brief on Behalf of Plaintiffs-in-Error at 4, Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) (No. 358).

[49] *Hayden*, 387 U.S. at 305 (discussing *Silverthorne*, 251 U.S. at 391). The decision reversed a trial judge's contempt charge issued against defendants for

included *copies* of documents that the Government possessed legally, and not just the illegally seized documents themselves, the Court nonetheless prohibited the United States from introducing the copies at trial, not on the ground that the copies were the defendants' intellectual property, but because the government must not profit from its own wrong.[50] Likewise, a year later, Gouled successfully petitioned the Court to prohibit the United States from using papers of evidentiary value only, even though he had lost his pretrial motion for return of the papers.[51] Since defendants in both cases achieved the chief-thing desired[52] without successfully asserting a superior property right in the object seized, Justice Brennan concluded (rightly or wrongly)[53] that the suppression remedy had crowded property law out of the Fourth Amendment limelight.[54]

Seven months after Brennan authored his opinion in *Hayden*, *Katz v. United States*[55] would literalize what Brennan had already established: that property law would no longer be the theoretical underpinning of the Fourth Amendment.[56] But Brennan was right in *Hayden*: the foundation for *Katz* was anything but new. It is by now a familiar story that from the time Congress empowered the Supreme Court to review crimi-

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their failure to comply with a *subpoena duces tecum* for records, which were illegally seized, then returned. *Silverthorne*, 251 U.S. at 391. Holmes said nothing directly about copies the Government had made of the records, except that illegally obtained evidence should not be used at all. *Id.* at 392. The illegal search and seizure occurred when officers, carrying only a subpoena, stripped the company office of all its books, papers, and documents and carried them away. Plaintiff's Brief at 4, *Silverthorne* (No. 358). The subpoena was overbroad, and, like any subpoena, carried with it no right of entry. *Id.* at 5, 9. Seven federal marshals executed the subpoena while the Silverthornes were elsewhere being arrested and admitted to bail. *Id.* at 4-5.

[50] *Hayden*, 387 U.S. at 305-06 (discussing *Silverthorne*, 251 U.S. at 392).

[51] *Gouled*, 255 U.S. at 312-13.

[52] *See* Thomas E. Atkinson, *Prohibition and the Doctrine of the* Weeks *Case*, 23 MICH. L. REV. 748, 758 (1924).

[53] For a criticism of Justice Brennan's position taken in *Hayden*, see Daniel Yeager, *Search, Seizure and the Positive Law: Expectations of Privacy Outside the Fourth Amendment*, 84 J. CRIM. L. & CRIMINOLOGY 249, 263-76 (1993).

[54] *Hayden*, 387 U.S. at 307.

[55] 389 U.S. 347 (1967).

[56] *Katz*, 389 U.S. at 353-54.

nal convictions and sentences, a "search" within the meaning of Fourth Amendment jurisprudence entailed some sort of physical invasion of an area that the search victim could claim as his own.[57] What is less familiar is that even in the days of this so-called "trespass doctrine"—which is generally viewed to have begun with *Boyd* in 1886 and to have been extinguished by *Katz* in 1967—privacy was its justification. No doubt Justice Brennan had it on good authority when he noted in *Hayden* that privacy had even then long been a Fourth-Amendment value.[58] For example, one reason that governmental investigators need a good factual basis to intrude into your constitutionally protected areas—your "persons, houses, papers, and effects"—is that those areas or interests are or can be the situs of matters or activities of intimacy;[59] or, in the view of Justice Bradley, who authored *Boyd*, it is the Supreme Court's job to guard against "all invasions on the part of the government . . . of . . . the privacies of life."[60] Similar language later appeared in the majority opinions of the first Justice Harlan,[61] and Jus-

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[57] *See, e.g.,* Olmstead v. United States, 277 U.S. 438 (1928).

[58] *Hayden*, 387 U.S. at 307-09.

[59] COOLEY, *supra* note 10, at 346.

> An important civil right is intended to be secured by the provisions incorporated in the National and State Constitutions, which, in substance, declare that unreasonable searches and seizures shall be unlawful, and that all persons shall be secure in their persons, houses, papers, and effects against them. In their origin these provisions had in view the mischiefs of such oppressive action by the government or its officers, as the seizing of papers to obtain the evidence of intended crimes; but their protection goes much beyond such cases: it justly assumes that a man may have secrets of business, of friendship, or of more tender sentiments, to which his books, papers, or letters may bear testimony, but with which the public have no concern; that he may even have secrets of shame which are so exclusively his own concern that others have no right to pry into or to discuss them.

Id. (footnote omitted).

[60] Boyd v. United States, 116 U.S. 616, 630 (1886).

[61] Interstate Commerce Comm'n v. Brimson, 154 U.S. 447 (1894).

> We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by

tice Day,[62] and throughout Prohibition, when privacy played a part in decisions where the Court invalidated the search-by-stealth of Gouled's office[63] and two overreaching searches incident to arrest for Agnello's cocaine[64] and Lefkowitz's liquor.[65]

Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen.

Id. at 478.

[62] Flint v. Stone Tracy Co., 220 U.S. 107 (1911).

It is urged in a number of the cases that in a certain feature of the statute there is a violation of the Fourth Amendment of the Constitution, protecting against unreasonable searches and seizures. This Amendment was adopted to protect against abuses in judicial procedure under the guise of law, which invade the privacy of persons in their homes, papers and effects, and applies to criminal prosecutions and suits for penalties and forfeitures under the revenue laws.

Id. at 174; *see also* Weeks v. United States, 232 U.S. 383, 390 (1914) ("Resistance to these practices had established the principle which was enacted into the fundamental law in the Fourth Amendment, that a man's house was his castle, and not to be invaded by any general authority to search and seize his goods and papers.").

[63] Gouled v. United States, 255 U.S. 298 (1921).

The prohibition of the Fourth Amendment is against all unreasonable searches and seizures and if for a Government officer to obtain entrance to a man's house or office by force or by an illegal threat or show of force, amounting to coercion, and then to search for and seize his private papers would be an unreasonable and therefore a prohibited search and seizure, as it certainly would be, it is impossible to successfully contend that a like search and seizure would be a reasonable one if only admission were obtained by stealth instead of by force or coercion. The security and privacy of the home or office and of the papers of the owner would be as much invaded and the search and seizure would be as much against his will in the one case as in the other, and it must therefore be regarded as equally in violation of his constitutional rights.

Id. at 305-06.

[64] Agnello v. United States, 269 U.S. 20 (1925).

And later, to the end that government employees without a warrant shall not invade the homes of the people and violate the privacies of life, Congress made it a criminal offense, punishable by heavy penalties, for any officer, agent or employee of the United States engaged in the enforcement of any law to search a private dwelling house without a warrant directing such search.

Id. at 32-33.

[65] United States v. Lefkowitz, 285 U.S. 452 (1932).

The disclosed circumstances clearly show that the prohibition agents as-

In between *Agnello* and *Lefkowitz*, fuller explication of privacy as a protected interest appeared in Justice Brandeis's famous dissent in *Olmstead v. United States*.[66] The dissent cautioned that the sort of warrantless, nonconsensual telephone tapping that revenue agents had done to Olmstead invades the privacy of the target and everyone he or she calls, violating "the right most valued by civilized men"—"the right to be let alone."[67] This reference to this cherished "right to be let alone" was nicked from Judge Thomas Cooley's treatise on tort law,[68] which makes not a single reference to this right in his treatment of the law of search and seizure.[69] In the 1940s[70] and 1950s,[71] the Court spoke often of the Fourth Amendment's

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> sumed the right contemporaneously with the arrest to search out and scrutinize everything in the room in order to ascertain whether the books, papers or other things contained or constituted evidence of respondents' guilt of crime, whether that specified in the warrant or some other offense against the Act. Their conduct was unrestrained. The lists printed in the margin show how numerous and varied were the things found and taken.
>
> The 4th Amendment forbids every search that is unreasonable and is construed liberally to safeguard the right of privacy.

Id. at 463-64.

[66] 277 U.S. 438, 471 (1928) (Brandeis, J., dissenting).

[67] *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting).

[68] *See generally* COOLEY, *supra* note 10.

[69] *Id.* at 346-47.

[70] Goldman v. United States, 316 U.S. 129 (1942). In *Goldman*, officers eavesdropped on conversations through the use of a "detectaphone" that was attached to, but did not penetrate, a common wall between federal agents and their suspects. *Id.* at 131. Justice Murphy, in dissent, relied heavily on Brandeis while describing "the right to privacy" as "[o]ne of the great boons secured to inhabitants of this country by the Bill of Rights." *Id.* at 136 (Murphy, J., dissenting). *See also* Brinegar v. Unites States, 338 U.S. 160, 176 (1949); Lustig v. United States, 338 U.S. 74, 79 (1949); Wolf v. Colorado, 338 U.S. 25, 27 (1949); United States v. Wallace & Tiernan Co., 336 U.S. 793, 798 (1949); Shapiro v. United States, 335 U.S. 1, 70 (1948) (Frankfurter, J., dissenting); Johnson v. United States, 333 U.S. 10, 14 (1948); Harris v. United States, 331 U.S. 145, 150 (1947); Zap v. United States, 328 U.S. 624, 628 (1946); Davis v. United States, 328 U.S. 582, 587 (1946); Oklahoma Press Publ'g Co. v. Walling, 327 U.S. 186, 204 n.30 (1946); Feldman v. United States, 322 U.S. 487, 492 (1944).

[71] *See* Henry v. United States, 361 U.S. 98, 102 (1959); Frank v. Maryland, 359 U.S. 360, 365 (1959); Jones v. United States, 357 U.S. 493, 498 (1958); Rea v. United States, 350 U.S. 214, 217-18 (1956); Irvine v. California, 347 U.S. 128, 132-33 (1954); Salsburg v. Maryland, 346 U.S. 545, 544 n.11 (1954); On Lee v.

protection of a right of privacy. Undoubtedly Justice Douglas was the loudest voice,[72] but not the only one. Bombshells like *Wolf v. Colorado*[73] and *Rochin v. California*[74] explicitly anticipated the abundant privacy-oriented decisions of the 1960s. By 1961, when the Court in *Mapp v. Ohio*[75] declared, "the right to privacy embodied in the Fourth Amendment is enforceable against the States,"[76] the privacy rationale that would be pronounced six years later in *Katz* could claim nearly a century of support.

B. Expectations of Privacy Outside the Fourth Amendment

1. The Positive Law as a Source of Expectations of Privacy

Once freed from the hold of property law, to what would the Court tie our reasonable expectations of privacy? A decade after *Katz*, the Court recognized that constitutionally protected expectations must lie somewhere outside of Supreme Court holdings. That recognition appeared in *Rakas v. Illinois*,[77] which denied Rakas a privacy expectation in a car in which he was a passenger, evidently for his failure to claim a possessory interest in the car or in the instruments of a robbery found therein.[78] In his majority opinion, Justice Rehnquist wrote:

> Legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference

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United States, 343 U.S. 747, 754 (1952); Rochin v. California, 342 U.S. 165, 172 (1952); Stefanelli v. Minard, 342 U.S. 117, 119-20 (1951); United States v. Jeffers, 342 U.S. 48, 52 (1951); District of Columbia v. Little, 339 U.S. 1, 7 (1950); United States v. Rabinowitz, 339 U.S. 56, 66 (1950); United States v. Morton Salt Co., 338 U.S. 632, 652 (1950).

[72] *E.g.*, Draper v. United States, 358 U.S. 307, 318-19 (1959) (Douglas, J., dissenting); Schwartz v. Texas, 344 U.S. 199, 205 (1952) (Douglas, J., dissenting); Pub. Util. Comm'n v. Pollak, 343 U.S. 451, 467 (1952) (Douglas, J., dissenting); Beauharnais v. Illinois, 343 U.S. 250, 285 (1952) (Douglas, J., dissenting); McDonald v. United States, 335 U.S. 451, 453 (1948).

[73] 338 U.S. 25 (1949).

[74] 342 U.S. 165 (1952).

[75] 367 U.S. 643.

[76] *Mapp*, 367 U.S. at 660.

[77] 439 U.S. 128 (1978).

[78] *Rakas*, 439 U.S. at 149.

> to concepts of real or personal property law or to understandings that are recognized and permitted by society. One of the main rights attaching to property is the right to exclude others, and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of his right to exclude. Expectations of privacy . . . need not be based on a common-law interest in real or personal property, . . . [b]ut . . . the Court has not altogether abandoned use of property concepts in determining the presence or absence of the privacy interests protected by [the Fourth Amendment].[79]

Rehnquist later clarified in *Rawlings v. Kentucky*[80] that "in all likelihood" did not mean "in all circumstances."[81] There, the Court rejected Rawlings's claim that his ownership of drugs found in an unjustified search of an acquaintance's purse violated his privacy. *Rakas*, Justice Rehnquist reasoned, had made "ownership . . . one fact to be considered[,] . . . [but] emphatically rejected the notion that 'arcane' concepts of property law ought to control . . . the Fourth Amendment."[82]

The authors of separate opinions in *Rakas* and *Rawlings* thought that the majorities in both had given property law too much[83] or too little[84] credit, even though nothing in

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[79] *Id.* at 143 n.12 (citation omitted).

[80] 448 U.S. 98 (1980).

[81] *Rawlings*, 448 U.S. at 104-06.

[82] *Id.* at 105. In United States v. Salvucci, 448 U.S. 83, 94-95 (1980), decided the same day as *Rawlings*, the Court rejected defendants' claim that their having been charged with a possessory offense conferred automatic standing on them to challenge a search conducted under a defective warrant of Salvucci's co-defendant's mother's apartment. "While property ownership is clearly a factor to be considered in determining whether an individual's Fourth Amendment rights have been violated," wrote the Court, "property rights are neither the beginning nor the end of this court's inquiry." *Salvucci*, 448 U.S. at 91.

[83] *Rakas*, 439 U.S. at 156 (White, J., dissenting). Justice White chastised the *Rakas* majority for tying the Fourth Amendment to property law, when the Amendment's privacy basis traditionally had made ownership and possession unnecessary as a condition to a search victim's right to suppress evidence. *Id.* (White, J., dissenting). *Cf. The Supreme Court, 1978 Term*, 93 HARV. L. REV. 62, 178 (1979) ("In the name of developing the *Katz* 'privacy' test, the *Rakas* Court has instead revived the centrality of property and possession by explicitly investing only the owner/possessor with a clear 'legitimate expectation.'").

[84] *Rawlings*, 448 U.S. at 111-13 (Blackmun, J., concurring); *id.* at 114-20

Rehnquist's opinion in either decision tells us how much weight the "consider[ation]" deserves.[85] Justice Blackmun told us in *Rawlings* that property rights should occupy a position somewhere above that given them by Rehnquist, but below that of the pre-*Katz* era:

> Nor do I read this Court's decisions to hold that property interests cannot be, in some circumstances at least, weighty factors in establishing the existence of Fourth Amendment rights. Not every concept of ownership or possession is 'arcane.' Not every interest in property exists only in the desiccated atmosphere of ancient maxims and dusty books. . . . In my view, th[e] 'right to exclude' often may be a principal determinant in the establishment of a legitimate Fourth Amendment interest.[86]

Despite the "weighty" and "principal" status of property law, Blackmun concluded that Rawlings's ownership of the drugs he had deposited in an acquaintance's purse moments before it was invaded by police was insufficient to ground a privacy interest, but more convincing evidence of a bailment contract between the parties (another expectation expressed in the positive law) would have led him to conclude otherwise.[87] (And that the facts of *Rawlings* did lead Professor LaFave—whom the Court has cited 123 times—to recognize Rawlings as bailee is a good sign that the Court had missed

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(Marshall, J., dissenting). *Cf.* Albert W. Alschuler, *Interpersonal Privacy and the Fourth Amendment*, 4 N. ILL. U. L. REV. 1, 13 (1983) ("[*Rakas*] did not elevate property rights over privacy rights so much as it diminished the value of both.").

[85] *Cf.* Ira Mickenberg, *Fourth Amendment Standing After* Rakas v. Illinois*: From Property to Privacy and Back*, 16 NEW ENG. L. REV. 197, 219 (1981) ("*Katz* and *Alderman* . . . [held] that the property right is merely one of many factors to consider in deciding [F]ourth [A]mendment issues. *Rakas* carried this line of reasoning to its logical conclusion by holding that the *Jones* test . . . was not dispositive, and was but one of many issues to consider."); *id.* at 223 ("[T]he *Rawlings* majority . . . list[ed] numerous factors other than possession of the purse which could have given the defendant a legitimate expectation of privacy.").

[86] *Rawlings*, 448 U.S. at 112 (Blackmun, J., concurring). *But see* Mickenberg, *supra* note 85 at 223 n.128 (suggesting that Blackmun "urges the adoption of such a fixed rule").

[87] *Rawlings*, 448 U.S. at 112-13 (Blackmun, J., concurring).

something essential there).[88] Justice Marshall dissented, agreeing with Blackmun's statement that not all property law is "arcane."[89] But Marshall's endorsement, too, at least in this case,[90] was pitched at too high a level of abstraction to be instructive. "Rejection of those finely drawn distinctions as irrelevant to the concerns of the Fourth Amendment," he wrote, "did not render property rights *wholly outside* its protection."[91] No doubt ownership or possession is for the Court *an* indicia of a protected interest. The uncertainty is over *how* to weight the interest. In the Court's own words, property law remains "marginally relevant," "weighty," "principal," and, according to a 1992 case, *Soldal v. Cook County*,[92] not altogether "snuffed out."

None of the decisions quoted above cut against the sense that, at its inception, *Katz*[93] was meant to supplement, not supplant, property law. And to the extent that pre-*Katz* cases such as *Jones v. United States*,[94] *Silverman v. United States*,[95] *Chapman v. United States*,[96] and *Hayden*[97] made

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[88] Professor LaFave properly criticized the Court for its failure to see that a bailment had in fact occurred, and for ignoring the legal consequences of such an arrangement. 4 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 11.3(c), at 153-58 (3d ed. 1996).

[89] *Rawlings*, 448 U.S. at 119 (Marshall, J., dissenting).

[90] In at least one other case, Marshall was explicit.

> As the Court acknowledges, we have traditionally looked to a variety of factors in determining whether an expectation of privacy asserted in a physical space is "reasonable." Though those factors do not lend themselves to precise taxonomy, they may be roughly grouped into three categories. First, we consider whether the expectation at issue is rooted in entitlements defined by positive law. Second, we consider the nature of the uses to which spaces of the sort in question can be put. Third, we consider whether the person claiming a privacy interest manifested that interest to the public in a way that most people would understand and respect.

Oliver v. United States, 466 U.S. 170, 189 (1984) (Marshall, J., dissenting) (citation omitted).

[91] *Rawlings*, 448 U.S. at 119 (Marshall, J., dissenting) (emphasis added).

[92] 506 U.S. 56, 64 (1992).

[93] 389 U.S. 347 (1967).

[94] 362 U.S. 257 (1960).

[95] 365 U.S. 505 (1961).

[96] 365 U.S. 610 (1961).

any other reading of *Katz* possible, then those cases, or those interpreting them, were wrong.[98] At its very narrowest (indeed, superficially), *Katz* solved the specific problem posed by modes of eavesdropping that the law of trespass could not adequately regulate. Or, as Judge Posner puts it, electronic eavesdropping interferes with the secrecy of communications, but not with the seclusional interests of the communicators.[99] *Katz*'s solution was that proof of a governmental trespass into a constitutionally protected area no longer would be a necessary condition to Fourth Amendment protection against quests for evidence.[100] Necessary, no; sufficient, yes.[101] It follows that the positive laws not only of property, but of crime, tort, and contract could easily govern a good number of cases that address when a search occurs, whose interest it invades, and who may privately authorize such a search. The Court purports to recognize this when it declared in *Rakas* that our expectations of privacy "must have a source outside of the Fourth Amendment."[102] That dictum notwithstanding, property law (specifically) and the positive law (more generally) remain relevant, but dilute—mentioned for unstated reasons and with inconsistency from case to case and justice to justice.[103] Property law's status, for example, slides awkwardly from "weighty" and "principal" to no status at all.[104] A more formal and less erratic acknowledgment of "expressed expectations of privacy before resorting to unexpressed ones would not only make Fourth Amendment litigation more predictable, but more protective as

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[97] 387 U.S. 294 (1967).

[98] *See* Yeager, *supra* note 53.

[99] POSNER, *supra* note 15, at 320-21.

[100] *Katz*, 389 U.S. at 352-53.

[101] It is not that property rights are "only marginally" relevant to Fourth Amendment cases, the Court recently explained; rather, as *Hayden* and *Katz* recognized that "protection of privacy" is the "'principle' object of the Amendment," property no longer is "the sole measure" of protection. But this is not to say, added the Court, that "this shift in emphasis had snuffed out" the relevance of property law to Fourth Amendment cases. Soldal v. Cook County, 506 U.S. 56, 64 (1992).

[102] *Rakas*, 439 U.S. at 144 n.12.

[103] *See* Yeager, *supra* note 53, at 306.

[104] Rawlings v. Kentucky, 448 U.S. 98, 112 (1980) (Blackmun, J., concurring).

well—at least where the positive law identifies an interest that a reviewing court could otherwise . . . ignore."[105]

The positive law is a source of data about expectations, many of which relate to the right to exclude others. And while I remain convinced that extant positive laws have a way of insinuating themselves into cases even where the Court expressly denies their relevance, here I am not so much interested in asking whether the garbage, liquor, and hotel room were abandoned in *Greenwood*,[106] *Hester*,[107] and *Abel*,[108] whether it was contract law that explains the outcomes in *Stoner*[109] and *Chapman*,[110] whether Cox had become the bailee of Rawlings,[111] whether the Kentucky and Texas laws of criminal trespass are relevant to whether Oliver[112] and Dunn[113] were searched, whether Michigan trade-secret law should have (or did) play a role in *Dow*,[114] whether FAA minimum-overflight regulations are meant to contribute to privacy,[115] or whether anything helpful or even intelligible is added by repudiating the privacy claims of nontrespassers like Carter[116] and Rakas,[117] but not of Olson[118] and Jones.[119] Instead, I'm being bitten by a bigger, or at least different flea: how should the Fourth Amendment respond if the evidence-gathering strategy is legally kosher, that is, if what the police do offends no expression of the positive law?

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[105] Yeager, *supra* note 53, at 252.
[106] California v. Greenwood, 486 U.S. 35 (1988).
[107] Hester v. United States, 265 U.S. 57 (1924).
[108] Abel v. United States, 362 U.S. 217 (1960).
[109] Stoner v. California, 376 U.S. 483 (1964).
[110] Chapman v. United States, 365 U.S. 610 (1961).
[111] Rawlins v. Kentucky, 448 U.S. 98 (1980).
[112] Oliver v. United States, 466 U.S. 170 (1984).
[113] United States v. Dunn, 480 U.S. 294 (1987).
[114] Dow Chem. Co. v. United States, 476 U.S. 227 (1986).
[115] California v. Ciraolo, 476 U.S. 207 (1986); Florida v. Riley, 488 U.S. 445 (1989).
[116] Minnesota v. Carter, 525 U.S. 83 (1999).
[117] Rakas v. Illinois, 439 U.S 128 (1978).
[118] Minnesota v. Olsen, 495 U.S. 91 (1990).
[119] Jones v. United States, 357 U.S. 493 (1958).

2. Laborious Questioning of Others

I doubt that anyone would give me too hard a time for stating that law is a source of expectations of privacy.[120] But what about the not-insubstantial number of cases where investigators whose acts of observation violate no property law, commit no crime or tort, and cause no breach of contract? *Then* what? To embellish Supreme Court pronouncements on the grammar of searches, Chris Slobogin published an empirical study in *Duke Law Journal* over a decade ago.[121] There he posited that if, according to *Katz* a search occurs when governmental action invades the suspect's reasonable expectation of privacy, then deciding whether a search occurs is an empirical question whose answer should serve as "social authority" (read, "law").[122] In other words, if the Court is going to reflect rather than dictate our expectations, then Slobogin would have us identify systematically what we expect. With that insight in mind, Slobogin asked a group—mostly students—to rate the intrusiveness of various governmental quests for evidence. While he concedes having picked his subjects in a way that might have tilted the results—most are law students or otherwise law sensitive[123]—still his study provides a far more accurate reflection of privacy expectations than the unidentified sources on which the Court relies. Specific examples of investigative practices that offend the public far more than they do the Court are the government's use of informers and the government's perusal of bank records.[124] But apart from the positive law and apart from laborious questioning of others about what they find intrusive and how intrusive they find it,

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[120] *Oliver*, 466 U.S. at 189 (1984); *see supra* note 90.

[121] CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE: REGULATION OF POLICE INVESTIGATION: LEGAL, HISTORICAL, EMPIRICAL, AND COMPARATIVE MATERIALS 219-25 (2d ed. 1998) (reproducing Christopher Slobogin & Joseph E. Schumacher, *Reasonable Expectations of Privacy and Autonomy in Fourth Amendment Cases: An Empirical Look at "Understandings Recognized and Permitted by Society,"* 42 DUKE L.J. 727 (1993)).

[122] Slobogin & Schumacher, *supra* note 121, at 755.

[123] *Id.* at 737.

[124] SLOBOGIN, *supra* note 121, at 221.

there must be some other way, some criteria, for getting at the question of what sorts of actions constitute a search and need as such to be justified by an adequate amount of antecedent suspicion.

My point here is not to undermine the value of Slobogin's survey. Indeed, I would rather bank on his empirical account of how the public assesses various intrusions than wait for the Court's pronouncements, which tend to or at least seem to come from out of nowhere. I say this fully aware, of course, that the Justices, too, are native speakers of English whose utterances are evidence of what we mean by, and how we use, the word "privacy." My intention here is to point to something that the Slobogin study does not: a method by which we could *elaborate* what would make an action count as intrusive enough to require a justification.

3. Three Steps Back to *Katz: Ciraolo* to *Riley* to *Bond*

In the published version of a speech he delivered at the University of Arizona in 1986, Wayne LaFave discussed at some length one of two overflight cases that the Court decided on the same day.[125] In *California v. Ciraolo*,[126]

> Santa Clara police received an anonymous tip that marijuana was growing in respondent's backyard. An effort at ground-level surveillance went for naught, as respondent had decided to conceal his gardening and other curtilage-based deportment from passersby with a solid 6-foot outer fence and 10-foot inner fence. Undaunted, the officer assigned to this investigation then secured a private plane and flew over respondent's house at an altitude of 1,000 feet. He and the officer with him, both trained in marijuana identification, readily identified in a 15 by 25 foot plot in respondent's backyard marijuana plants growing 8-10 feet high . . . .
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> Based upon an affidavit describing the anonymous tip and those observations, a search warrant was issued and

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[125] *See* Wayne R. LaFave, *The Forgotten Motto of* Obsta Principiis *in Fourth Amendment Jurisprudence*, 28 ARIZ. L. REV. 291, 295-308 (1986).

[126] 476 U.S. 207 (1986).

executed, resulting in the seizure of 73 marijuana plants.[127]

After Ciraolo's suppression motion was denied, he pleaded guilty to unlawful gardening, but a state appellate court reversed the conviction on the ground that the aerial observation was an illegal search of Ciraolo's "curtilage."[128] The Supreme Court, however, held that no search had occurred.[129] To substantiate this conclusion, Chief Justice Burger stated that "[t]he Fourth Amendment simply does not require the police traveling in the public airways at this altitude to obtain a warrant in order to observe what is visible to the naked eye."[130] In fact, Burger continued, "a 10-foot fence might not shield these plants from the eyes of a citizen or a policeman perched on the top of a . . . 2-level bus."[131] LaFave reports that the Chief Justice had, just before the October 1985 Term, visited London.[132] LaFave could not confirm that while there Burger had actually ridden one of these buses, which Burger nevertheless imagined posed a threat that marijuana growers must guard themselves against. But LaFave did note that "[t]he Chief Justice's reference to double-decker buses suggests that his travels to London have had a profound effect upon his outlook, but it does not reflect knowledge of the state of affairs in Santa Clara . . . . [where] there are no double-decker buses . . . ."[133] Elaborating the dissenters' claim that "the actual risk to privacy from commercial or pleasure aircraft is virtually nonexistent,"[134] LaFave emphasized as well that the majority "fails to acknowledge the qualitative difference between police surveillance and other uses made of the air space. Members of the public use the air space for travel, business, or pleasure, not for the purpose of observing activities taking place within

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[127] LaFave, *supra* note 125, at 295-96
[128] *Ciraolo*, 476 U.S. at 210.
[129] *Id.* at 214-15.
[130] *Id.* at 215.
[131] *Id.* at 211.
[132] LaFave, *supra* note 125, at 298 n.44.
[133] *Id.* at 298 (footnote omitted).
[134] *Id.* at 300 (citing *Ciraolo*, 476 U.S. at 223 (Powell, J., dissenting)).

residential yards."[135]

This position that LaFave and the four dissenters in *Ciraolo* took toward the deployment of airplanes as a way of getting enough information to authorize a subsequent search picked up some real momentum three years later in *Florida v. Riley*,[136] which featured a helicopter hovering around at 400 feet, a low but lawful height.[137] While Justice White's opinion for the plurality relied largely on *Ciraolo*'s risk analysis,[138] Justice O'Connor wrote separately to express that a search takes place whenever the government positions itself as an observer in a way or from a vantage point that would be non-routine for a private actor to occupy.[139] The Pasco County Sheriffs' naked-eye observations made from a helicopter of Riley's curtilage (a close-to-the-home greenhouse with a missing pane of glass in a rural area known best for the production of Kumquats) were held to be a nonsearch.[140] Five justices, however, refused to follow the teaching of *Ciraolo*, which ruled that anytime the government is acting lawfully (at least with the unaided eye) it is by definition then not searching, that is, not invading a reasonable expectation of privacy.[141] Those five in *Riley* were: O'Connor[142] (who sided with the majority because Riley adduced no evidence that such occurrences were unusual and she saw no need to remand the case for such findings), Blackmun[143] (who dissented and would remand for such findings), plus Brennan, Marshall, and Stevens (who dissented and saw no need to remand).[144]

Despite the pile of *Katz* cases decided by the Court in the

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[135] *Id.* at 301 (quoting *Ciraolo*, 476 U.S. at 224 (Powell, J., dissenting)).

[136] 488 U.S. 445 (1989).

[137] *Riley*, 488 U.S. at 448.

[138] *Id.* at 450 (plurality opinion).

[139] *Id.* at 454-55 (O'Connor, J., concurring).

[140] *Id.* at 452 (plurality opinion).

[141] Certainly I am not the first to notice this. *See, e.g.*, Sherry F. Colb, *What Is a Search? Two Conceptual Flaws in the Fourth Amendment Doctrine*, 55 STAN. L. REV. 119, 132 (2002).

[142] *Riley*, 488 U.S. at 452 (O'Connor, J., concurring).

[143] *Id.* at 467 (Blackmun, J., dissenting).

[144] *Id.* at 456 (Brennan, J., dissenting).

1980s, culminating in *Riley*, there have been precious few in the fifteen years since. There have been two complete non-events: *Padilla*[145] (working out the stake that co-conspirators may have in the property used in their illegal ventures) and *Kyllo*[146] (what I see as a much-ado-about-nothing re-affirming of *Karo v. United States*).[147] There has been one potentially revelatory instance of *Katz* analysis: *Minnesota v. Carter*.[148] In *Carter*, when Officer Thielen cozied up for fifteen minutes to the window of Thompson's apartment—stepping around some shrubs to install himself only a foot from a window almost-but-not-quite-perfectly covered with horizontal blinds—he was violating no Minnesota law I know of.[149] This was no search of casual business guests Carter and Johns, we were told, though we got no answer on whether it was a search *at all*, meaning, whether it was a search of Thompson, in whose apartment the criminal drug-packaging venture was being pursued. Only Justice Breyer ruled on the question, stating for only himself in just one page that Thielen's Peeping Tomming was no search: that type of intrusion is lawful and a risk you run living in a garden apartment with a crack in your blinds.[150]

There has been one most interesting though compressed, recent, post-*Riley* decision on point, however: *Bond v. United States*.[151] Bond and Wiggs (a co-defendant at trial) were passengers on a Greyhound Bus traveling on I-10 en route to Little Rock, Arkansas when it was boarded by U.S. Border Patrol

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[145] United States v. Padilla, 960 F.2d 854, 859-60 (9th Cir. 1992).

[146] Kyllo v. United States, 533 U.S. 27 (2001).

[147] *See id.* at 39 (citing Karo v. United States, 468 U.S. 705 (1984)). For the view that *Kyllo* was a significant decision, see Christopher Slobogin, *Peeping Techno-Toms and the Fourth Amendment: Seeing Through* Kyllo's *Rules Governing Technological Surveillance*, 86 MINN. L. REV. 1393 (2002) and Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and New Technologies After* Kyllo, 86 MINN. L. REV. 1325 (2002).

[148] 525 U.S. 83 (1998).

[149] *Carter*, 525 U.S. at 85.

[150] *Id.* at 105-06 (Breyer, J., concurring); *see also* Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness"*, 98 COLUM. L. REV. 1642, 1681 nn.155-83 (1998).

[151] 529 U.S. 334 (2000).

Agent Cesar Cantu Jr. at an immigration checkpoint near El Paso, Texas.[152] After doing some "immigration checks," Agent Cantu reports: "as I was working my way out, I felt a green bag that I could feel a brick-like object in it."[153] Bond and Wiggs were seated together beneath the green canvas bag, which measured "about maybe a foot and a half long by a foot tall, about a foot width."[154] Because agents frequently find narcotics packaged in brick shapes, this one aroused the suspicions of Agent Cantu.[155] When Cantu then asked who owned the bag, Bond (who had been established as lawfully in the country) claimed ownership and became nervous.[156] Cantu asked for permission to search the bag; Bond granted it.[157] The brick-shaped object was 1.34 pounds of methamphetamine[158] wrapped in a pair of pants.[159] After Bond and the bag were taken off the bus, Cantu returned and squeezed Wiggs's backpack, which also had a similar brick-shaped object in it.[160] When Cantu asked who owned it, Wiggs claimed ownership,[161] admitted that he and Bond were traveling together,[162] and apparently consented to a search of his backpack,[163] which revealed a 1.32-pound brick of methamphetamine.[164] The men were Mirandized, waived their rights, and in response to a brief interrogation, confessed that a man in California named Tony Alvarez was going to pay them for delivering the drugs to an un-named man at a Holiday Inn in Little Rock.[165] The suspects were then handed over to the

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[152] *Bond*, 529 U.S. at 335.

[153] *Id.* at 339 (Breyer, J., dissenting).

[154] Hearing on Motion to Suppress Evidence Held on September 18, 1997, at 10, United States v. Bond (No. EP-97-CR-682-H).

[155] Hearing at 10, *Bond* (No. EP-97-CR-682-H).

[156] *Id.* at 11-12.

[157] *Id.* at 12.

[158] *Id.* at 18.

[159] *Id.* at 12-13.

[160] *Id.* at 15-16.

[161] *Id.* at 16.

[162] *Id.*

[163] *Id.* at 17.

[164] *Id.* at 18.

[165] *Id.* at 19-22.

DEA.[166]

While squeezing a backpack in an overhead luggage rack is perfectly lawful, the Court, through Chief Justice Rehnquist, still held that it was an unjustified search.[167] It would follow, therefore, that the consent which the suspects gave the agent was a fruit of that unjustified search.[168] The majority distinguished *Ciraolo* and *Riley*, which "involved only visual, as opposed to tactile, observation. Physically invasive inspection is simply more intrusive than purely visual inspection."[169] The Court then alikened the frisk of the bag to another "great indignity":[170] a *Terry* pat-down of the outer clothing.[171] Passengers do, the Court conceded, run certain risks regarding the way their luggage will be handled by passengers and carrier personnel.[172] But what Agent Cantu did "far exceeded the casual contact [petitioner] could have expected from other passengers."[173]

The distinction that the four dissenters and concurring Justice O'Connor had acknowledged in *Riley*—that even when police are in a lawful vantage point, still they conduct a "search" when they act in a way that few people would[174]—must have somehow succeeded in introducing through *Bond* a new, or, I should say, renewed, version of *Katz*. But still, how would we know how routine or non-routine what Agent Cantu did should be established? How would we know, apart from the sort of laborious questioning of others that Professor Slobogin performed? What were the bases of the Court's conclusions in *Bond*? How *Bond* squares with other sorts of risk analyses—that of undercover agents in whom you misplace confidence, of your bank or phone company letting others pe-

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[166] *Id.* at 24.

[167] *Bond*, 529 U.S. at 338-39.

[168] *Id.* at 336 n.1.

[169] *Id.* at 337.

[170] *Id.*

[171] *See* Terry v. Ohio, 392 U.S. 1, 16-17 (1968).

[172] *Bond*, 529 U.S. at 338.

[173] Brief for the Petitioner at 18-19, United States v. Bond, 529 U.S. 334 (2000) (No. 98-9349) (internal quotations omitted).

[174] Florida v. Riley, 488 U.S. 445, 452-68 (1989).

ruse your records, of overflight in helicopters or fixed-wing aircraft in public navigable airspace, or that your friend's car that you are riding in will be unjustifiably searched—remains opaque. We get little elaboration in these decisions, though the facts certainly are representative of the sorts of observations that police make from lawful vantage points.

That Justice Breyer would dissent in *Bond*, taking the position that this was a non-search, should be unsurprising, given the sort of extended risk-analysis he applied to Officer Thielen's lurking around outside Thompson's apartment in *Carter*.[175] Writing for himself and Justice Scalia in *Bond*, Breyer cites the same cases as Rehnquist does for the majority, and even alludes to O'Connor's concurrence in *Riley*,[176] which I remind you asks whether the "intrusion is a 'sufficiently routine part of modern life'" to qualify as a non-search.[177] What the majority and dissenters differ on is ultimately a complicated empirical question: whether baggage routinely gets explored the way the suspects' bags did here. In concluding that it does, Breyer relied on the lower court's ruling, plus three snippets from newspaper articles and a Seventh Circuit opinion that address how luggage in overhead bins gets "shoved," "crammed," "recrammed," and "rearranged."[178] I am not going to get into whether passengers with bad manners should set our expectations. But I am quite convinced that none of these descriptions of what happens to luggage, however—true or not—captures the mode in which Agent Cantu was operating. And how, exactly are they different?

IV. The Role of Intentions in Fourth Amendment Analysis

I begin with an important bit of common ground in the majority and dissenting opinions in *Bond*: both cite *Whren v. United States*[179] and other cases[180] for the proposition that

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[175] Minnesota v. Carter, 525 U.S. 83, 103 (1998).
[176] *Bond*, 529 U.S. at 341.
[177] *Id.*; *see also Riley*, 488 U.S. at 453.
[178] *Bond*, 529 U.S. at 340.
[179] 517 U.S. 806 (1996).

"the subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment."[181] Yet no one would dispute, I take it, that the intentions of the suspect or search victim *do* matter in determining whether the officer's actions violate the Fourth Amendment. *Katz* can be read to say that to be a search victim, you must "have demonstrated an intention to keep activities and things . . . private . . . ."[182] For example, when Katz deposited a dime in the public pay phone and closed the door, he demonstrated an intention to exclude the "uninvited ear," even though he did not succeed, given that the government-installed listening device intercepted his conversations.[183]

What the Court repeatedly insists upon is that a police officer's intentions play no role in Fourth Amendment analysis. Its fullest explication of this notion appears in *Whren*: the case that both the majority and dissent cited for that very proposition in *Bond*. *Whren* purported to solve the so-called pretext problem. The solution, in turn, relied heavily on the Court's view of the role that intentions play in Fourth Amendment law. I am hoping that a fairly close reading of *Whren* will pay dividends in our arriving at discovery or agreement on whether police intentions or motivations (as the Court is fond of putting it) have anything to tell us about what constitutes a search.

A. What Is a Pretext?

To say that the action claimed is not the action that occurred is not to describe the action as pretextual, except in a too-extravagant sense. With pretexts, the action is not feigned. What is concealed is a special reason, a motive: what is con-

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[180] *Bond*, 529 U.S. at 339 n.2 (citing California v. Ciraolo 476 U.S. 207, 212 (1986)); *Bond*, 529 U.S. at 342 (Breyer, J., dissenting) (citing United States v. Dunn, 480 U.S. 294, 304-05 (1987)).

[181] *Bond*, 529 U.S. at 339 n.2 (citing *Whren*, 517 U.S. at 814); *Bond*, 529 U.S. at 342 (Breyer, J. dissenting) (citing *Whren*, 517 U.S. at 813).

[182] *See* LaFave *supra* note 125, at 299 (citing Eric Dean Bender, Note, *The Fourth Amendment in the Age of Surveillance: Curtains for the Curtilage?*, 60 N.Y.U. L. REV. 725, 753-54 (1985)); *see also supra* note 90.

[183] Katz v. United States, 389 U.S. 347, 352 (1967).

cealed is something in the world to be achieved or set up by the action, something that normally would not strike someone as the upshot of the action. A pretext is a criticism we make of an action that has a motive that is, like all motives, at odds in some way with the action: the motive for the generous action toward the fragile relative is to inherit under the will. The motive could be greed (because greed is directed at something—here, the money that the will would make available). If the generous action is just plain generous without such directedness, then it is nonsense to speak in terms of motive, though there may be reasons for the generosity (for example, feeling good about oneself). But such reasons are not motives if they are psychological or inner,[184] even though we tend to think of motives as inner states rather than as explanations of something to be attained in the world by a certain course of action.[185] And while it is common among psychologists to suggest that all actions have motives (or are motivated),[186] in fact we use the word "motive" only infrequently in ordinary speech.[187] We use the word only in reference to actions we feel the need to assess, to make sense of.[188] Among those actions that do have reasons, not all reasons are necessarily directed. Considerateness or punctuality, for example, are reasons for actions, yet they are not motives; they have no aim, no directedness; they are not setting anything up.[189]

Thus, references to motives come up in moral discourse where we need to make sense of an action. If we say, "what was his motive?" it must be because it looks to us as though

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[184] *See* Paul J. Gudel, *Beyond Causation: The Interpretation of Action and the Mixed Motives Problem in Employment Discrimination Law*, 70 TEX. L. REV. 17, 72-73 (1991).

[185] *See, e.g.*, Massachusetts v. Painten, 389 U.S. 560, 565 (1968) (White, J., dissenting) ("[S]ending state and federal courts on an expedition into the minds of police officers would produce a grave and fruitless misallocation of judicial resources.")

[186] R.S. PETERS, THE CONCEPT OF MOTIVATION 31 (R.F. Holland ed., 1958).

[187] *Id.* at 28; N.S. Sutherland, *Motives as Explanations*, 68 MIND 145, 153 (1959).

[188] PETERS, *supra* note 186, at 29.

[189] *Id.* at 32.

the action had to be directed at something untoward, but we cannot figure out what it was. When we say that Macbeth's motive in killing Duncan was ambition, we are not referring to a feeling or some internal perturbation of Macbeth;[190] instead, the motive of ambition refers to some other actions, some other ends to be attained by the killing, whether or not the actions are known to him.[191] Likewise, if a man looks pleased when praised for something trivial, or upset when mildly criticized, we can say he is vain, but we cannot say vanity is his motive for being pleased when praised.[192] Vanity may explain certain actions, but it cannot be considered a motive for them.[193] Pretext is, therefore, an inquiry into a motive that the actor is covering up. Any actor, once put on the spot by being questioned about his motives, will either confirm or dispel our suspicions by going on record and offering a reason for the action or denying having any reason at all. If we accept that the action had no motive, or perhaps had no reason whatsoever (as in "I just did it" or "I just felt like doing it"),[194] then the action cannot be pretextual. Thus "pretext" is the term we apply to an action that we conclude was directed in an unconventional or untoward way that the actor was aware of, regardless of whether he is willing to admit to it. Put slightly differently, if after confronting the explanation for the action, we cannot accept the action as conventional or ordinary, then we may be inclined to call it a pretext. For example, we may say: "Your motive in marrying her was greed; you married her for her money." If the accused in such a pinch were to respond: "No, I married for love," to that we may respond: "No, you are incapable of love. The marriage is for you just a pretext for moneymaking." That is to say, love is the conventional, ordinary reason for marriage, but it is not the reason for this one. Accordingly, pretext is a way of criticizing an action that had a motive that is incompati-

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[190] Gudel, *supra* note 184, at 73.

[191] *Id.*

[192] *Id.*

[193] *See* ROY LAWRENCE, MOTIVE AND INTENTION: AN ESSAY IN THE APPRECIATION OF ACTION 23 (1972).

[194] Gudel, *supra* note 184, at 75.

ble with the ordinary, conventional reasons, if any, for the action.[195]

B. Pretextual Police Action

Likewise, pretextual police action occurs when police do the right thing for the wrong reasons,[196] i.e., they perform a lawful action with an improper motive. For example, the Supreme Court has held that a search of an arrestee follows automatically from a lawful arrest.[197] This bright-line rule prevents the destruction of evidence and protects the arresting officers from weapons within the arrestee's reach.[198] But what happens if an officer arrests and searches someone who has violated a law against, say, public drunkenness, when the officer's motive in arresting is to look for obscene materials in the arrestee's satchel?

Defense attorneys insist that obscene materials or other evidence found on the arrestee should be suppressed on grounds of pretext.[199] The suppression hearing, their argument runs, should demand from the arresting officer an account of his reasons for his actions: "Why did you arrest *that* person *then*? You had no interest in enforcing the public drunkenness laws, did you?"[200] It is the trial judge's job under such a view to decide whether the officer did the right thing (arrest a drunk) for the wrong reason (to search for obscene materials). If the officer did arrest the drunk *just* to explore for obscene materials, defense attorneys have long argued that the trial

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[196] There is alternative way of seeing the matter. J.L. Austin, for example, states that "[a] pretext may be not a genuine reason or not your real reason: a pretence may be something you are not genuinely doing or not what you are really doing." J.L. AUSTIN, *Pretending*, *in* PHILOSOPHICAL PAPERS, *supra* note 18, at 262 n.1. By this account, in the above example, the marriage would be a pretence and love a pretext.

[196] *See* John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 101 (1982).

[197] Chimel v. California, 395 U.S. 752, 763 (1969).

[198] *Chimel*, 395 U.S. at 763.

[199] Burkoff, *supra* note 196, at 72-84.

[200] *See* James B. Haddad, *Pretextual Fourth Amendment Activity: Another Viewpoint*, 18 U. MICH. J.L. REFORM 639, 641-43 (1985).

judge should invalidate the otherwise lawful police action on grounds of pretext.[201] Invalidating the arrest as unconstitutional would justify the exclusion of the evidence, if any, "come at by exploitation of that illegality."[202]

1. *Whren v. United States*

The viability of this defense strategy culminated in *Whren v. United States*, where an unmarked police car containing two officers and an investigator stopped two African-American youths in a Nissan Pathfinder for some trivial traffic offenses.[203] In effecting the stop, police peered into the truck and saw in passenger Whren's lap some cocaine that was later used to convict him and driver Brown of serious drug, not traffic, offenses.[204] Because it was plainclothes vice-squad officers in an unmarked car enforcing the District of Columbia's traffic laws—an action that their own departmental regulations prohibited—Whren and Brown insisted that the traffic stop was a pretext for a drug investigation that could not have warranted the car stop based merely on the officers' flimsy (but accurate) hunch that drug activity was afoot.[205]

Though the case made it all the way to the Supreme Court, it is unclear just what the parties or the courts take to be the criteria of pretexts. For example, in its brief, the ACLU asserted: "[H]ad the police conducted themselves in accordance with the regulation a court could presume, subject to rebuttal, that the search was not pretextual."[206] Yet in actuality, it is not

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[201] *See id.* at 644-46.

[202] Wong Sun v. United States, 371 U.S. 471, 488 (1963) (quoting JOHN MACARTHUR MAGUIRE, EVIDENCE OF GUILT: RESTRICTIONS UPON ITS DISCOVERY OR COMPULSORY DISCLOSURE 221 (1959)).

[203] Whren v. United States, 517 U.S. 806, 808 (1996); *see also* United States v. Whren, 53 F.3d 371, 372 (D.C. Cir. 1995), *aff'd*, 517 U.S. 806 (1996).

[204] *Whren*, 517 U.S. at 808-09. "Whren was sentenced to 168 months incarceration and five years supervised release on count one, 168 months incarceration and ten years supervised release on count two, one year imprisonment and one year supervised release on each of counts three and four. All terms were to be served concurrently." *Whren*, 53 F.3d at 373. Brown received a nearly identical sentence. *Id.* at 373-74.

[205] *Whren*, 517 U.S. at 815.

[206] Brief of Amicus Curiae American Civil Liberties Union in Support of Peti-

the search that was even arguably pretextual; it is the traffic stop. As for the relevance of the departmental regulations, compliance with them would make a stronger, not weaker, case of pretext. That is, police compliance with departmental regulations would make it easier to conclude that it really was a traffic stop, which is a necessary condition of a pretextual traffic stop.

Most of the oral argument in *Whren* involved discussion of a departmental regulation forbidding plainclothes officers in unmarked cars to make traffic stops unless the traffic violation "is so grave as to pose an *immediate threat* to the safety of others."[207] To the petitioners, the police who stopped Whren, Officers Soto, Littlejohn and Investigator Howard,[208] violated the Fourth Amendment because reasonable officers would not have made a stop that their employer precluded them from making.[209] To this, the Court responded that all the Department need do is have the unmarked car ask a marked car to make the stop.[210] The Court's suggestion, however, would leave petitioners' question unanswered: How should the Fourth Amendment, not the police, respond when the police violate their own rules?[211]

The real payoff of a discussion of the fact that police deviated from departmental regulations lies in its ability to tell us not whether police abused their discretion (so what if they did?), but more importantly, to tell us *what they were doing*. The real relevance of their breaking their own regulations, accordingly, is that it is a piece of evidence that bears on the

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tioners at 14 n.6, Whren v. United States, 517 U.S. 806 (No. 95-5841).

[207] *Whren*, 517 U.S. at 815 (citing Metropolitan Police Department, Washington, D.C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(a)(4) (Apr. 30, 1992)).

[208] *Whren*, 53 F.3d at 372. The Supreme Court mentioned only Officer Soto by name. *See Whren*, 517 U.S. at 808-10.

[209] *See* Brief for the Petitioners at 32, Whren v. United States, 517 U.S. 806 (No. 95-5841); Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Petitioners at 6-7, Whren v. United States, 517 U.S. 806 (No. 95-5841) (discussing the "purely objective" approach).

[210] Oral Argument at 11, Whren v. United States, 517 U.S. 806 (No. 95-5841).

[211] *See id.* at 3-29.

issue of *what they were actually doing*. An officer's pulling someone over when he lacks the authority to do so does not, without more, make the stop a traffic stop, much less a pretextual traffic stop.

This angle was only adumbrated at oral argument, where the interlocutors briefly touched on snippets from Soto's and Littlejohn's testimony from the suppression hearing in *Whren*.[212] There, Soto testified that the truck was stopped at a stop sign for over twenty seconds,[213] though earlier, at the preliminary hearing, he had said he did not know how long the truck waited at the stop.[214] And while Soto testified at the suppression hearing that the truck failed to signal before turning right,[215] he had made no mention of that infraction at the preliminary hearing or in the police report.[216] The only infraction that Soto insisted on throughout the case was that the truck "sped off quickly," presumably after seeing the unmarked police car perform a u-turn.[217] But even with regard to the infraction for speeding, Soto admitted at the suppression hearing that he "wasn't going to issue a ticket to him at all."[218] Rather, he explained, "My intention[] was to pull him over and talk to him [about the full time and attention and speed violations]."[219] Departmental regulations, however, prohibited oral warnings except under narrow circumstances not present there.[220] As for Littlejohn, he never saw the stop as a response to any traffic violations at all. For him, the delay at the stop sign gave them reasonable suspicion, though he never came out and said what it was that he suspected.[221]

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[212] Oral Argument at 35-38, *Whren* (No. 95-5841).

[213] Brief for the Petitioners at 5, *Whren* (No. 95-5841).

[214] *Id.* at 5 n.5.

[215] *Id.* at 6.

[216] *Id.* at 6 n.6.

[217] *Id.* at 5.

[218] *Id.* at 6-7.

[219] *Id.* at 7 (second alteration in original).

[220] *Whren*, 517 U.S. at 815 (citing Metropolitan Police Department, Washington, D.C., General Order 303.1, pt. 1, Objectives and Policies (A)(2)(a)(4) (Apr. 30, 1992)).

[221] Oral Argument at 39-40, *Whren* (No. 95-5841); Brief for the Petitioners at 6

Oral argument brought out not only that the officers acted contrary to departmental regulations, but also that (1) the officers were neither in agreement nor consistent in their claims that they observed any traffic violations, and (2) the officers admitted that they did not intend to *enforce* the traffic laws at all. And what, exactly, is the relevance of these details? The officers' deviation from their department's own rules, along with the way they comported themselves during the pursuit and stop of the truck (as well as when they went on record about the pursuit and stop in subsequent legal proceedings), gives us an account of what they were doing. To figure out what police were doing is a crucial matter, far more so than why they were doing it, which is potentially interesting but almost always doctrinally irrelevant. The real issue is whether this was a constitutional, that is, plain view sighting of drugs pursuant to a lawful traffic stop.[222]

In upholding the convictions, however, the Court never fully engages the real issue, thus replicating the indirection of the oral argument. Rather, the Court puts most of its capital into an attempt at distinguishing earlier precedents which had indicated that Fourth Amendment doctrine must deter pretextual searches and seizures.[223] Whatever success *Whren* might have had in attempting to reconcile its prior pretext cases, it did succeed in establishing that there is very little room for pretext arguments in Fourth Amendment law.[224] The conclusion makes good sense; what remains mysterious is why.

To be sure, Whren's argument is hard to take too seriously, given that it directs reviewing courts to zero in, not so much on *what* police were doing (enforcing traffic laws? drug laws? both?), but *why* they were doing it (to make the roads safer? catch drug dealers? get promoted? kill time?). Petitioners' argument was that what justifies a search or seizure is not merely whether police have a certain amount of suspicion or knowl-

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n.7, *Whren* (No. 95-5841).

[222] *See* Coolidge v. New Hampshire, 403 U.S. 443 (1971).

[223] *Whren*, 517 U.S. at 811-13.

[224] *Id.* at 813.

edge about whether crime is afoot—"probable cause" in Fourth Amendment terms—but in addition, "whether a police officer, acting reasonably, would have made the stop for the reason given."[225] Indeed, the implications of suggesting that police articulate *why* they decided to stop a bad driver are potentially absurd, leading inexorably to the following: two drivers speeding down the street, one of whom police believe (but not strongly enough to justify a stop) is also a drug dealer.[226] The implication of petitioners' argument is that in such circumstances police should be allowed to stop *only* the speeder whom they do *not* also suspect of some other crime. In other words, to rule in Whren's favor would leave us with a doctrine which says, at least to a point, that the more suspicions you have, the less justification you have to act on them.[227]

In dismissing Whren's suggestion that reviewing courts ask questions along these dead-end lines ("Why, officer, did you stop *that* bad driver?"),[228] the Court was on the right track in remarking that it saw "no realistic alternative to the traditional common-law rule that probable cause justifies a search and seizure."[229] And this much is true: If Whren really had been driving in violation of D.C. law, then police were right to stop him. Indeed, if police saw him break traffic laws, then who cares whether police hoped for or even expected a bonus (be it drugs or whatever) to be realized during the stop? What matters is *whether* they were enforcing the traffic laws, not why.

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[225] *Id.* at 810.

[226] Haddad, *supra* note 200, at 690; James B. Haddad, *Well-Delineated Exceptions, Claims of Sham, and Fourfold Probable Cause*, 68 J. CRIM. L. & CRIMINOLOGY 198, 211 (1977) [hereinafter Haddad, *Well-Delineated Exceptions*].

[227] *See* Abel v. United States, 362 U.S. 217, 253 (1960) (Brennan, J., dissenting); Brief for the United States at 25, Whren v. United States, 517 U.S. 806 (No. 95-5841) ("[I]t would be unreasonable to forbid a police department from focusing its finite resources disproportionately on those observed traffic offenders whom officers in the field suspect may also be engaged in more serious offenses."); Haddad, *Well-Delineated Exceptions*, *supra* note 226, at 211.

[228] *Whren*, 517 U.S. at 815-19.

[229] *Id.* at 819.

2. Pretextual or Unconstitutional? How to Tell the Difference

The happy part of *Whren* is the Court's insistence that probable cause that traffic laws had been violated is the key to any evaluation of the constitutionality of the stop and search of the truck. The unhappy part is that the Court made no effort to establish *how* we would determine that it was the probable cause on which police were relying when they got themselves into a position to see cocaine in Whren's lap. Nowhere does the Court acknowledge that, even with probable cause to stop the car, police still might have performed an unconstitutional seizure to verify a hunch about drug activity rather than perform a lawful traffic stop.

And how would we tell the difference between a lawful traffic stop and an unlawful drug investigation? That depends on whether what the officers claim to have done is consistent with what was seen in the public, observable world. In other words, it is at this point that the distinction between intentions and motives, and their roles, should begin to reveal itself. Suppose, for example, a case in which officers search a house at night under the authority of a daytime-only search warrant, discover evidence of crime, and claim later in the litigation that their intent in entering the house was to make a warrantless emergency arrest.[230] That the officers did not intend to execute such an arrest is demonstrated by the fact that they applied for a search warrant for an illegal distillery, took the warrant to the house, produced it before entering, and searched the house after locating the suspect. This is not a pretextual, warrantless entry to arrest; it is not a warrantless entry to arrest *at all* because it lacks the characteristics of an action directed at arresting rather than searching. As a result, any evidence obtained in the house or on the arrestee's person

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[230] Haddad, *supra* note 200, at 655-57 (citing Jones v. United States, 357 U.S. 493 (1958)). This hypothetical is based very loosely on *Jones*, which in actuality was a much closer case, far too close to demonstrate much of anything. There, despite what the majority found, police really did have reason to believe that Jones, whom they knew was running an illegal still, was inside at the time of the entry. *See Jones*, 357 U.S. at 500-03 (Clark, J., dissenting).

should be excluded.[231] Indeed, this is an unconstitutional warrantless entry to search *even if* there was probable cause to believe the search victim was a dangerous felon. Unless police conducted themselves at the house in a way that is consistent with an intention to rely on the doctrine they now cite as the authority for their actions, then it is not so much that police were *arresting* pretextually (so what if they were?), but that they were *searching* unconstitutionally.

If it really was a warrantless entry to arrest, then who cares why it was performed? What matters is what the police were doing. Did they have probable cause that a serious crime had been committed? Would getting a warrant have posed a danger to themselves or the public? Did they enter the premises without a warrant and commit themselves in a way that indicated that they were looking to get their hands on a dangerous person, not for evidence squirreled away in the house?[232] If so, then they have performed a lawful, warrantless entry to arrest a dangerous criminal,[233] and any reason or motive external to the action that they might have had is irrelevant.

Once we insinuate the enforcement of traffic laws into the Fourth Amendment, however, determining what police really were doing becomes harder. Take, for example, the case of a male officer who stops an attractive female motorist who suspects that she has been stopped for his amusement, not to make the roads safer. Of course it is always open to the officer to *invent* a traffic offense, but the motorist in such a case has worries quite apart from why the traffic stop occurred, that is, quite apart from whether it was pretextual. Indeed, to claim that the stop was pretextual is incompatible with a claim that the police later invented the justification for the stop. Although police perjury is far from trivial,[234] with pretexts the claim is

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[231] *See* Wong Sun v. United States, 371 U.S. 471, 479-80 (1963).

[232] *See, e.g.*, Minnesota v. Olsen, 495 U.S. 91, 100 (1990).

[233] *Id.*

[234] *See, e.g.*, Donald A. Dripps, *Police, Plus Perjury, Equals Polygraphy*, 86 J. CRIM. L. & CRIMINOLOGY 693 (1996); Christopher Slobogin, *Deceit, Pretext, and Trickery: Investigative Lies by the Police*, 76 OR. L. REV. 775 (1997); Christopher

that police are lying not about what they have done, but about why they have done it.

The only concern here is with suspects whom police *do* have some justification in stopping. What the motorist who really is a traffic offender is expressing when she complains about her encounter with the overly friendly officer is either (1) despite facts justifying some police action, it is not that justified action which police were really taking; or (2) despite facts justifying this police action, the action had a "social" motive. While these two objections to what police have done tend to be treated as though they are coterminous, they are not. The first objection is to call the stop unconstitutional; the second objection is to call it pretextual. Pretexts may be dead as means of depicting police illegality, but the core of what many defendants claiming pretext are getting at is not, if only because of a snag in distinguishing pretextual from unconstitutional police action. That is, what remains open to defendants who could justifiably have been stopped, but who question the conditions of the stop anyway, is to argue that police were not doing what they said they were doing: their actions (regardless of their motives, if motives there be) did not have the *intention* that police claim at the suppression hearing to have had on the street.

Assuming the motorist was violating the traffic laws, there must be some procedures we can use to reveal what this officer's motives were. If the officer approached the car and asked the driver out for a date, then it was not a pretextual traffic stop; it was an unconstitutional one, that is, it was not a *traffic stop* at all, even with probable cause. It *could have been* a traffic stop, but the officer chose to conduct a social stop instead. If, however, the officer asked her for her license and registration, advised her of what she had done and issued her a ticket or warning, then we can conclude that the officer acted, in the public, observable world, like someone who intended to enforce the traffic code. In other words, he *was* enforcing the traffic code.

Slobogin, *Testifying: Police Perjury and What to Do About It*, 67 U. COLO. L. REV. 1037 (1996).

When I discussed this issue with some San Diego police officers who had been admonished for mixing the personal with the professional in this very way, I received a range of responses, which included this one: "So you mean that if I give her a ticket first and then ask her out it's okay, but if I ask her out first then it's not?" The answer to this is, of course, "Yes, from a Fourth Amendment standpoint." In other words, there is little more we can ask when taking positions on what has occurred in the public, observable world than that people act in a way that can be reconciled with their claims about their own actions. (If I am always nice to you—I treat you well, attentively, even tenderly—then it makes little difference whether I "really" like you.)

Yet to require only that the officer have the intent to rely on the doctrine in question may not sufficiently protect against pretexts or abuse of the doctrine. Professor Haddad suggests that when a doctrine is intolerably susceptible to abuse—to pretextual police action—the doctrine should be altered to eliminate that susceptibility.[235] The Court recognized as much in *Chimel v. California* by putting a stop to thorough searches of residences incident to the arrest of occupants.[236] Before *Chimel*, officers were conducting arrests at suspects' residences and converting those arrests into exploratory searches of the residences without first obtaining search warrants.[237] The arrests, one could say, were pretextual means of realizing the motive of ransacking the house. Unhappy with the hazards posed by a doctrine that permitted such abuse of the power to arrest, the Court limited the permissible scope of a search incident to arrest to the arrestee and his grab-area.[238]

This approach, which Haddad dubs "the hard-choice approach,"[239] has the appeal of avoiding intractable attempts at uncovering the motive or motives behind the action, in favor of

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[235] Haddad, *supra* note 200, at 652-53.

[236] Chimel v. California, 395 U.S. 752, 764-68 (1969).

[237] *See, e.g.*, United States v. Rabinowitz, 339 U.S. 56 (1950); Harris v. United States, 331 U.S. 145 (1947).

[238] *Chimel*, 395 U.S. at 764-68.

[239] Haddad, *supra* note 200, at 651-53.

changing the law in order to take away the incentive to stage pretextual police actions. Take, for example, a hypothetical of Haddad's:

> Suppose that defense counsel claims that the police have executed a dated but valid traffic arrest warrant as a pretext to enter a narcotics suspect's house, hoping to discover heroin either in plain view or within the scope of a search incident to arrest.
>
> One approach would be to narrow the scope of the underlying power: the right to enter a home to execute an arrest warrant. The Supreme Court could declare that arrest warrants expire after a certain period of time, at least where the police efforts to execute the warrant have lapsed. Or the Court could make a less drastic alteration in [F]ourth [A]mendment law by declaring that after a period of time, absent continuous diligent effort to execute a *misdemeanor* arrest warrant, the warrant, though still valid for some purposes, would not authorize entry into a suspect's home. The Court would reason that if authorities place such a low priority on a prompt arrest, the governmental interest does not outweigh the individual's right to be free from police entry into his home at the nearly unbridled discretion of the police.[240]

In other words, Haddad's hard-choice approach, itself traceable to Justice Brennan's dissent in a 1960 case,[241] would treat the pretext problem as resolvable *doctrinally*: not by condemning a given police search or seizure as pretextual, but by changing the background rules against which police act. Quibbling over whether the entry was a pretext fails to tell us much, even if the real reason for the action (why the officer was doing that) rather than what the action was (the intention of the action) was easily accessible to us. Accordingly, when a pretext problem arises, if we do not like what police are doing in such cases, Haddad would have us ask: Did police demonstrate the intent to rely on the doctrine in question? And if

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[240] *Id.* at 652 (footnotes omitted).

[241] Abel v. United States, 362 U.S. 217, 248-56 (1960) (Brennan, J., dissenting).

their having done so does not dispel our concerns about abuse of the doctrine, then we should consider altering the doctrine.

Whren, however, is a flinty case, resistant to evaluating what it was that police were really doing. Assume that the traffic violations alluded to by Officer Soto did occur. When Soto and Littlejohn took the stand at the pretrial hearing where Whren and Brown moved to suppress the cocaine, one could have asked: What, if anything, was said between the officers before the stop? Did they discuss the Nissan's erratic movements? Did they discuss their then-unsubstantiated suspicions about drug activity? Did the officers explain the point of the stop to the driver? If not, then why not? Was it due to their being distracted? By what? Seeing the drugs? Did the officers ultimately ticket the driver? Why not? Because it seemed trivial compared with what was discovered? By questioning the intentions of the officers in this manner, we get, in their elaboration of what they were doing, a chance to respond to their going on record when they tell us, and expect us to rely on them when they tell us, what their intentions were. And despite what the Supreme Court may say, this inquiry into intentions is a way of determining what happened and is not meant to be a way of peeking into what went on *behind* what happened.

In Whren's case, even if the police did initiate a traffic stop, in light of their prompt plain-view sighting of cocaine, there was good reason for their not following through on that original intention or plan. The traffic stop might well have been the original plan, but it might have dropped out when, after undertaking that original plan, police saw that they had their hands on some drug offenders.[242] In this situation, their failure to follow through—their failure to treat this as a traffic stop—by no means demonstrates that the stop was, at its inception, a drug investigation, though it may certainly give us pause.

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[242] *Cf.* Haddad, *supra* note 200, at 678 n.178 (citing cases that hold that a traffic stop need not culminate in a citation or warning in order to be constitutional).

The difference between this case and the case of the officer who used the traffic laws to improve his social life has something to do with what changes in plan, what sorts of distractions, can count in our attempt to come to grips with what action the officer was performing. In other words, we could ask: Was *Whren* a drug investigation (masquerading as a traffic stop), and was the officer who stopped the attractive motorist embarking on a social adventure (also masquerading as a traffic stop)? When the officers converted Whren's traffic stop into a drug investigation, their overlooking the traffic offenses makes good sense (though it would lead to their being given a hard time in the witness box at the suppression hearing). After all, the plain view discovery of evidence that could lead to decades of imprisonment is just the sort of distraction to which we may expect law enforcers to yield when the plan began as a stop that could by itself culminate in no more than the issuance of a citation and summons.

But then why suggest that the failure to pursue the traffic infractions in *Whren* "may certainly give us pause"? Because that is a response that is open whenever someone says that they were doing something—here, enforcing the traffic laws—that is at least arguably at odds with the way they comported themselves. But with the officer who asks the motorist for a date, we would likely be a good deal more skeptical about the basis of the distraction. Why be distracted by *that*? And even if the distraction is quite literally natural, that does not adequately explain actually yielding to it, not in the context of policing. Indeed, the basis of the distraction in such a case is trivial when compared to that in *Whren*: trivial, again, in light of the objectives of policing. And even if the officer who asked the motorist for a date really did observe a traffic offense and really saw himself as committed, *at first*, to performing a traffic stop, all we have to evaluate the action is what we see in the public, observable world, including of course his account of it. While it is perfectly plausible that the officer who asked the motorist for a date was every bit as committed to carrying out the original plan as the officers in *Whren* were, when his actions suggest a social call, it is an account that is more likely to

be rejected, given that it is hard to count desire as a distraction *in that context*. Such an account would have no real sway, not in light of what could pass for a commitment to enforce the traffic laws in the first instance.[243]

3. The Role of Intentions in Fourth Amendment Analysis

The procedures I suggest for unraveling the problem posed by pretextual police action entail questioning police so that we may take a position on what they were doing (confronting their intentions) as opposed to why they were doing it (confronting their reasons, their motives, their purposes). *Whren*'s weakness is not that it kills off pretext claims—that is really no weakness at all—but that it threatens to kill off any meaningful evaluation of what police do. For instance, at one point the *Whren* Court remarks that "[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."[244] For reasons that remain foggy, this is a phrase of which the Court is particularly fond.[245] And it is safe to say the parties only compound the problem.[246]

But what could this utterance possibly mean? In this context the word "subjective" is borderline nonsense, as it must be whenever used to modify "intention" or any other term of inculpation or exculpation. In other words, there is no such

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[243] *But cf.* Haddad, *Well-Delineated Exceptions*, *supra* note 226, at 205 (suggesting that evidence discovered against a traffic offender who was stopped as a pretext for asking the driver out on a date would be *less* likely to be challenged by defense counsel as a pretext than would evidence discovered against a traffic offender who was stopped as a pretext for a drug investigation).

[244] Whren v. United States, 517 U.S. 806, 813 (1996).

[245] *See, e.g.*, United States v. Knights, 534 U.S. 112, 123 (2001) (Souter, J., concurring); Arkansas v. Sullivan, 532 U.S. 769, 772 (2001); Atwater v. City of Lago Vista, 532 U.S. 318, 372 (2001) (O'Connor, J., dissenting); City of Indianapolis v. Edmond, 531 U.S. 32, 45 (2000); Bond v. United States, 529 U.S. 334, 338 n.2 (2000); Crawford-El v. Britton, 523 U.S. 574, 604 (1998) (Rehnquist, C.J., dissenting); Bogan v. Scott-Harris, 523 U.S. 44, 55 (1998); Ohio v. Robinette, 519 U.S. 33, 38 (1996).

[246] *See, e.g.*, Brief for the United States at 15, *Whren* (No. 95-5841) ("An inquiry into whether an officer's action was 'pretextual' is inherently an inquiry into his subjective intent."). A Westlaw search of the term "subjective-intent!" in the United States Supreme Court database returns eighty-one cases.

thing as a subjective intention. Subjective as opposed to what? Objective? What would the difference denote exactly? Could one imagine any specific application of utterances such as, "His subjective intention was *X* but his objective intention was *Y*"? If so, then what would it be? His intention according to him (subjective) as opposed to his intention according to others whom we may identify through laborious questioning (objective)? In other words, is it to say that a subjective intention is a claim you make about your intentions, but an objective intention is a claim someone else makes about your intentions? If so, then what makes others' claims objective? Their distance? That is, their ability to know how things are with us better than we do ourselves? So there really are two *kinds* of intentions? That cannot be the law (or the grammar of "intention" either).

When we refer to intentions, we are trying to make sense out of an action in a context where subjective and objective have no specific application. Indeed, speaking in terms of intentions as subjective *or* objective plays into one of the great myths of legal notions of responsibility: that references to intentions are references to something inside us.[247] Intentions are said to be subjective because they are secret "mental states," which can only be inferred by others (objectively) through close observation of behavior.[248] Take this perfectly

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[247] *See* Graham v. Connor, 490 U.S. 386, 396-97 (1989); United States Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716-17 (1983).

> The state of a man's mind is as much a fact as the state of his digestion. It is true that it is very difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained it is as much a fact as anything else.

Aikens, 460 U.S. at 716-17 (quoting Edgington v. Fitzmaurice, 29 Ch. D. 459, 483 (1885)).

[248] *See* RICHARD A. POSNER, OVERCOMING LAW 397 (1995).

> Judges and juries do not, as a precondition to finding that a killing was intentional, peek into the defendant's mind in search of the required intent. They look at the evidence of what the defendant did and try to infer from it whether there was advance planning or some other indication of a high probability of success, whether there was concealment of evidence or other indicia of likely escape, and whether the circumstances of the crime argue a likelihood of repetition . . . .

conventional and representative account from a leading book of criminal law theory where legal philosopher Michael Moore holds: "My own intentions are usually known to me in a way different from how they are known to a third-person observer, the latter having to make behavioral inferences since he lacks my first-person experience."[249] Moore says we must infer, a second-rate form of knowing, but if close enough attention is paid to the data, to the way the body moves and what the mind must have willed it to do, then we can discover this thing called the "intention."

This psychologizing of intentions, however, misses out on why we talk about intentions:

> Descriptions of mental events or processes are not acceptable as answers to questions about what our intentions are. A request for our intentions is not a request for a description of something inside us, but a request for us to perform a certain act that requires us to go on record or to commit ourselves in a certain way that justifies the reliance of other persons on what we profess our intentions to be.
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> . . . .
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> It is not, then, that intentions are difficult to observe or to have "direct evidence" of. Intentions simply are not the sorts of things that *can* be observed, any more than one can observe the number five (not some particular written or printed instance of the number five, but the number itself). This does not mean they are necessarily hidden; it only means that the concept of "observation" has no obvious application to them. When we say something like, "The intentions of another cannot be directly observed," we have no coherent idea of what it would mean to "observe another's intention." If anything is meant by this phrase at all, it probably is something along the lines of "observe his intention as he himself observes it." But there is no such thing as this; there is no thing called "the intention" we observe by introspection just before every action we take. Intentions are not observed, either by

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Id.

[249] MICHAEL S. MOORE, ACT AND CRIME: THE PHILOSOPHY OF ACTION AND ITS IMPLICATIONS FOR CRIMINAL LAW 94 (1993).

> ourselves or by others.
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> We use the language of intentions, and impute intentions to persons, *as a way of making human actions intelligible to ourselves*. We do not make actions intelligible to ourselves by adverting to an inner event that preceded that action. *Our interest in human actions is not usually in how they were produced, but in how they can be more fully understood*. Because this is what the attribution of intentions does, the language of intentions has reference to the public, observable world, not to an inaccessible world of inner events.[250]

Professor Paul Gudel offered this as a response to the Supreme Court's so-called "mixed motives" problem in employment discrimination cases,[251] but it has point in any context where questions of responsibility arise. References to intentions are made in order to limit responsibility by demanding that the accused go on record, typically by proffering an excuse. That is, in asking what your intentions were, we are asking for an explanation of your actions, but we are not asking for you to make reports about something inside you, be it a mental state or any other sort of internal perturbation.

So if we get rid of that misleading referent—subjective—we are left with the following utterance: "[I]ntentions play no role in ordinary, probable-cause Fourth Amendment analysis."[252] Now what? Could the Court really emphasize that probable

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[250] Gudel, *supra* note 184, at 84-85 (footnotes omitted) (second and third emphases added).

[251] *Id.* at 18.

> [I]magine a supervisor who is biased against women and who actively dislikes dealing with women in the workplace. Imagine also that one of his employees is a woman who has her failings as an employee—perhaps she is chronically absent from work or achieves consistently low performance levels. At some point, the supervisor fires her.
>
> Now imagine that the woman sues the employer for sex discrimination and at trial introduces evidence that her supervisor was biased against women. The employer introduces evidence that the woman was fired because she was a poor employee. This is what the courts have called a "mixed motives" case. How do we sort out the relationship between the facts submitted by both sides and the employer's decision?

Id.

[252] *See Whren*, 517 U.S. at 813.

cause to stop the car was what made the stop impervious to criticism in *Whren*, but say at once that what police intended to do is irrelevant? But what makes probable cause critical to the constitutionality of searches and seizures is that it is strongly suggestive that police act *on* that knowledge, that is, they act with a certain intention. If the police officers' account of their intentions — their going on record and telling us that we can rely on them when they tell us what they were doing — is irrelevant, then how would we be able to take positions on what it was that they were doing? How would we be able to tell that it was the traffic violations that occasioned the stop and not some unsubstantiated hunch, or racism (a reason that *does* matter),[253] or spite (a reason that, rightly or wrongly, does not)? Without confronting their intentions, we would know it was a stop sure enough, but we would not know if it was a traffic stop, a stop to investigate drug activity, a stop to kill time, or whatever. In other words, we cannot know what to make of the action once it is called into question unless we take a stab at getting the accused to go on record about how things were with him. *Of course* the intentions of police matter; investigating intentions and finding out what was done are on the same level, part of the same enterprise; indeed, they *are* the same enterprise. When we get to the suppression hearing in criminal cases, questioning police about their intentions is essential to our evaluation of what they have done. Otherwise we would not know how to respond to what happened. But to say, as the Court did in *Whren*, and has reiterated since, that the intentions of police are irrelevant,[254] is to say that our interest in what police have *done* is irrelevant. And that much is wrong.

But in this particular and peculiar utterance, it is evident what the Court is getting at, or more accurately, what it is revealing: a view of intentions which casts them as internal states, the content of which is inferred through close observa-

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[253] *Id.* ("We of course agree . . . that the Constitution prohibits the selective enforcement of the law based on considerations such as race.").

[254] *See supra* note 245.

tion. Yet if intentions are part of the secret, subjective selves, then how can we ever avoid being held hostage by lies and indirection ("No one can tell me what I was thinking!") except by, in the *Whren* Court's words, "root[ing] out . . . subjective intent through ostensibly objective means"[255] (whatever that means). By making this recommendation, what the Court is responding to is the difficulty in knowing others, that difficulty accounting for the development of a doctrine that makes the hidden, secret selves—the "state of mind"[256] of others—irrelevant whenever possible. This, however, badly mischaracterizes what an intention is, which is simply a device, a way of talking about human action, for making action intelligible where there is some reason to question what was done.

All this seems to only glance off the Court. When the Court elaborates in *Whren* that "the Fourth Amendment's concern with 'reasonableness' allows certain actions to be taken in certain circumstances, *whatever* the subjective intent[,]"[257] it is hard to get a picture of what, in the Court's view, would constitute an action without an intention, subjective or otherwise. By definition, an action has an intention.[258] If you are pushed or stung by a bee or are having a seizure, then you are not *acting* at all; if you harm someone by mistake or accident, then you have acted, though there your intentions in one way or another misfire: you take the wrong one or something befalls. In other words, an action without an intention is a happening or an occurrence, but not an action.[259] You perform an action inten-

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[255] *Whren*, 517 U.S. at 814.

[256] *Id.* ("Instead of asking whether the individual officer had the proper state of mind, the petitioners would have us ask, in effect, whether (based on general police practices) it is plausible to believe that the officer had the proper state of mind.").

[257] *Id.*; *see also* Kenneth Gavsie, Note, *Making the Best of* "Whren": *The Problems with Pretextual Traffic Stops and the Need for Restraint*, 50 FLA. L. REV. 385, 387 n.22 (1998) ("[P]robable cause for any traffic violation will suffice for a reasonable stop regardless of an officer's true intentions.").

[258] *See* J.L. AUSTIN, *Three Ways of Spilling Ink*, *in* PHILOSOPHICAL PAPERS, *supra* note 18, at 280-81 ("I may 'have no purpose (whatsoever)' in doing something, just as I may take no care. But I don't 'have no intention (whatsoever)' in doing something.").

[259] *See* CARLOS J. MOYA, THE PHILOSOPHY OF ACTION 12 (1990).

tionally only if you have some idea of what you are doing, when you are putting yourself to whatever is realized.[260] J.L. Austin captures what he calls this "most subtle . . . notion[]" of intention when he writes:

> I must be supposed to have *as it were* a plan, an operation-order or something of the kind on which I'm acting, which I am seeking to put into effect, carry out in action: only of course nothing necessarily or, usually, even faintly, so full-blooded as a plan proper. When we draw attention to this aspect of action, we use the words connected with intention.[261]

As Stanley Cavell puts it, "[Y]ou can't be intending to do a thing if you don't *know* you're doing it, or rather don't know how what you are doing could have that consequence (if you didn't know about the child, you can't have intended to frighten it)."[262] Thus, a police officer who does not mean to do anything at all is not acting, period. Accordingly, "in assessing official responsibility for police acting *as police*, it makes good sense to require that police *intend* to investigate crime or enforce laws before they may be held responsible in their investigative or enforcement capacities."[263] Likewise, when we are confronting the question of whether a search or seizure is constitutional, we cannot get an accurate picture of what was done without confronting what it was that police were putting themselves to. A traffic stop is characterized as such not merely by the fact that police pull someone over intentionally; that would demonstrate only that it was a stop. But by claiming to foreclose on inquiries into police intentions, the Supreme Court threatens to foreclose on our telling the difference between a plan (though nothing so full-blooded as a plan) to effect a traffic stop, a drug investigation, or an instance of harassment,

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[260] AUSTIN, *supra* note 258, at 283.

[261] *Id.* (footnote omitted).

[262] STANLEY CAVELL, *A Matter of Meaning It*, *in* MUST WE MEAN WHAT WE SAY?, *supra* note 16, at 233.

[263] Daniel Yeager, *"Oops!": Inadvertence, Intentionality, and the Police*, 24 SEARCH & SEIZURE L. REP. 157, 157 (1997).

racial or otherwise. Evaluating the constitutionality of the stop entails coming to grips with the officers' account of their intentions in the context of the other facts available. And to the extent that the Court says otherwise—and they do—is more than a little misleading.

C. The Role of Intentions in the Law of Search

1. In Theory: Seeing and Snooping

If I have made some headway in describing and lightly criticizing the Court's view of the role of intentions in Fourth Amendment law, then I'd like to put myself to mapping this discussion specifically on to the Court's view of *Katz*. Please recall that both the majority and dissent in *Bond* proclaimed that intentions are irrelevant in Fourth Amendment analysis.[264] Recall as well that in addition to citing *Whren*, both majority and dissent cited for that proposition two cases in which the Court held that no search occurred. In the first, *Ciraolo*, it was Chief Justice Burger's position for the majority that the fact that police—not commercial or recreational air travelers—were flying above Ciraolo's marijuana plot made no constitutional difference in determining whether a search occurred.[265] In the second, *United States v. Dunn*, Justice White's majority opinion cited *Ciraolo* to support his conclusion that the question of what constitutes a protected curtilage as opposed to an unprotected open field is invariant to the intentions of police.[266] More precisely, White ruled that shining a flashlight into a barn that was obscured by fishnetting (and to which access was impeded by a fence and a locked gate at the end of a driveway) is not made a search by the intentions of police to discover evidence.[267] The pertinent utterance from *Ciraolo* on which White relies in *Dunn* is:

> We based our holding [in *Ciraolo*] on the premise that the

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[264] *See supra* notes 181-83 and accompanying text.
[265] California v. Ciraolo, 476 U.S. 207, 213 (1986).
[266] United States v. Dunn, 480 U.S. 294, 304-05 (1987).
[267] *Dunn*, 480 U.S. at 304.

> Fourth Amendment "has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares." Importantly, we deemed it irrelevant that the police observation at issue was directed specifically at the identification of marijuana plants growing on an area protected by the Fourth Amendment.[268]

What kind of argument is this? To make intentions irrelevant to a discussion like this requires that we describe the activity in question at the highest level of generality imaginable. In other words, we would have to describe the activity in question as "flying," from which it follows that police investigators, like recreational and commercial travelers, are in the most generalized sense doing the same thing: flying. But everyone knows that flying and spying aren't the same thing. I suppose (if we felt the need to, if we felt staked in saying so) we could call it "flying for the purpose of spying." But isn't that what spying *is*? (These two "elements" are here no more severable than the chicken's crossing the road and the "purpose" of getting to the other side: their intimacy or non-severability explains why it is a funny joke). Escaping from police and going for a personal best in a ten kilometer race both instantiate "running," but we would no more describe those actions in merely that way than we would describe shooting a gun at a range and at an enemy merely as "shooting." Indeed, even when a shooting is admittedly directed at or intended to kill another, the applicability of the defense of justification turns entirely on the intention of the shooter: it is self-defense if the shooter intended to defend himself from a deadly or near-deadly threat (and had grounds for sensing such a threat), but it is murder if the shooter intends to kill someone who poses or seems to pose no such threat. A murder leads at a minimum to a lengthy imprisonment while a justified killing can lead to a medal, yet both are, at the highest level of abstraction, "shootings." That the intention alone explains why we treat these vaguely similar actions differently strikes me, though appar-

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[268] *Id.* at 304-05 (citing *Ciraolo*, 476 U.S. at 213) (citation omitted).

ently not the Supreme Court, as manifest.

As I argued above in my discussion of *Whren*, the intention is what characterizes the action as an action at all, as opposed to a mere occurrence or happening. Intentions are never irrelevant to ascriptions of responsibility, which is what inquiries into whether a search took place are: if it was a search, then police would have to justify it by reference to a sufficient amount of antecedent suspicion. Absent sufficient suspicion or the intention to act on that suspicion, suppressing evidence so derived would be an expression of our holding the government responsible for causing an unjustified harm.

Inadvertent revelations or discoveries are always read on a different moral plane than intentional ones. That is, just as one is not being lewd when one undresses unaware that the curtains are open, neither is one being nosy when one overhears a conversation or reads correspondence that was sent to him or her inadvertently or by mistake. Bringing something about that was outside your plan is something most of us would forgive you for. I recall a friend (now a law dean) recounting how she once had a houseguest, who, while my friend was at work, helped herself to a quick perusal of the high-school yearbook off the shelf. When my friend returned, she was greeted with: "you looked so sad in high school." I suppose we could, if you insist, describe the friend's act as "reading," but that boiled-down description doesn't quite capture the action, not at least in the way I assess it. But since here the act of choosing that book was directed at a discovery about her host's past, we would ask (as Scott Sundy would ask about Greenwood's garbage): why look at *that* book, *then, there*? I suppose at this point it is plausible to say: you should have locked the book in the attic or taken the precaution of enjoining your guest from looking at it. These are plausible responses, but as responses go, they are evasive if not weak. What is being evaded is an acknowledgement of what sort of action had been performed: reading or snooping? There must be a way to tell the difference, and in a legal regime wedded to privacy, telling the difference between reading and snooping—between seeing and spying—*is* the point.

2. In Action: Is Spying Really All That Bad?

The privacy approach, much better than the trespass approach, recognized that many governmental attempts to ferret out evidence—searches—would take place when the search victim is present, but the government is not. That is, one could say that all sorts of eavesdroppings, electronic or otherwise, occur in the search victim's *present*, but not in his or her *presence*. This type of surveillance, which lacks the sort of supervision over the body that Foucault insists is such a crucial aspect of what makes imprisonment punitive, invades, but it does not coerce.[269] That it does not coerce in no way trivializes the *wrong*, though it does potentially trivialize the *harm*, at least in those cases in which the search victim not only has no felt sense of being observed, but even never learns of it at all, if only because insufficient evidence on which to commence a prosecution is gathered.

It bears repeating that this is not to discount the wrong or harm caused by a search that occurs outside the presence of the search victim, that is, where the search victim is absent during the police entry or, if present, is unaware that he or she is being watched. Thus, I am not recommending that spying is preferable in any way to an unjustified face-to-face encounter, which may in fact involve coercion against the body of the search victim incident to the assertion of authority over the searched area. In other words, somewhat unusual decisions such as *Michigan v. Summers*[270] demonstrate that the authority which police have over a place derivative of their right to search can also entail an authority over the body of the search victim as well to facilitate the search, prevent escape or the destruction of evidence, or prevent the suspect's obtaining a weapon that could be used against the officers before, during, or after the execution of the search.[271] Without belaboring a comparison between the powers to search and arrest, it strikes

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[269] MICHEL FOUCAULT, DISCIPLINE & PUNISH: THE BIRTH OF THE PRISON 195-230 (Alan Sheridan trans., Vintage Books, 2d ed. 1995) (1975).

[270] 452 U.S. 692 (1981).

[271] *See generally id.*

me as uncontroversial to say that searches that occur outside the presence of the search victim are just as wrong as coercive encounters if, to lift a term of Yale Kamisar's, "comparative reprehensibility"[272] matters. The harm could conceivably be just as lasting, too, I'm sure. But that, too, is of little moment to me, at least now. What does currently strike me as staked is how the harm when a search occurs in the presence of the search victim differs from when a search occurs outside the presence of the search victim, quite apart from the difference that may arise out of those instances when searching an area allows for (doctrinally) seizing, arresting, or otherwise coercing (pushing around) the search victim. Or, as Judge Posner has stated the distinction, when police tap your telephone (as opposed to burst in on you when you are home), there is an invasion of privacy, but "[t]here is no interruption—no breaking in on your solitude or concentration."[273]

Consider, for example, *United States v. Knotts*.[274] In that case, the seller of a can of chloroform allowed police to place an electronic beeper in the can so they could track it and its possessors.[275] The Court held that the use of the beeper was not a search of the can or the car in which it traveled because the beeper did nothing that visual surveillance could not.[276] In fact, the driver knew that police were following him, so one could perhaps say that the "stalking" of the driver coerced him into driving evasively.[277] Indeed, Bill Stuntz made this very point nearly a decade ago in the *Michigan Law Review*, where he complained that privacy was over-regulated by a Supreme Court that, as a result, left police coercion or low-level police-violence under-regulated.[278] But suppose the driver in *Knotts*

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[272] Yale Kamisar, *"Comparative Reprehensibility" and the Fourth Amendment Exclusionary Rule*, 86 MICH. L. REV. 1, 2 (1987).

[273] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 29.1, at 639 (3d ed. 1986).

[274] 460 U.S. 276 (1983).

[275] *Knotts*, 460 U.S. at 285.

[276] *Id.*

[277] *Id.* at 278.

[278] *See* Stuntz, *supra* note 14, at 1023-24.

did not know he was being followed. In that case, Stuntz would say that no search occurred because the sense of coercion is missing.

There is something strange about saying that spying must be "felt" in order to be wrong. This is not to say that undetected spying is as bad as stalking; it probably is not. Stalking describes the constant, one-sided spying that made Bentham's Panopticon—a work camp where inmates knew a guard would surveil them from a central tower into which the prisoners could not see—such a brilliant method of control, without the high costs of the dungeon's isolation.[279] But as punitive as stalking may be, it only partially captures what is wrong with spying.

Greek myth has it that Gyges, a barbarian, succumbed to the king of Lydia's requests that he spy on the king's own wife and "peruse her person" while she undressed.[280] Gyges knew well the old saying "[l]et each look on his own," or, in the queen's words, to not "behold what is not lawful for you."[281] So when he "gazed on her [nakedness]," Gyges knew he acted "wickedly."[282] In Plato's *The Republic*, Glaucon told a different version of the myth. Gyges stole a ring from a corpse he discovered after an earthquake.[283] When Gyges learned that by turning the collet of the ring towards himself he would become invisible, he used this power to seduce the queen and seize the empire.[284] Glaucon argues that even a just man with Gyges's ring could not "stick by justice and bring himself to keep away from what belongs to others and not lay hold of it, although he had license to take what he wanted from the market without fear."[285] Socrates, however, immediately instructs Glaucon that "the soul must do the just things, whether it has Gyges'

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[279] FOUCAULT, *supra* note 269, at 199-200.
[280] *See* HERODOTUS, THE PERSIAN WARS ch. 8 (George Rawlinson trans., 1942).
[281] *Id.*
[282] *Id.* at chs. 8, 10.
[283] PLATO, THE REPUBLIC 359d-e, at 37 (Allan Bloom trans., 2d ed. 1991).
[284] *Id.* at 360a-b, at 37-38.
[285] *Id.* at 360b, at 38.

ring or not."[286]

Whichever version of the myth you prefer, I assume you will concur that whatever made Gyges's actions unjust had nothing to do with his being caught. Thus not only is Justice Stevens correct when he says that "[a] bathtub is a less private area when the plumber is present even if his back is turned[,]"[287] but the reverse is true as well: the plumber's presence ruins the privacy of even a blind or inattentive bather. Spying does lose some of its aggressiveness when it is undetected, though it remains aggressive to the extent that we *fear* being spied on; but undetected spying never loses its privacy-bashing essence. Indeed, the Court acknowledged as much when in *Massiah v. United States*[288] it cited with approval a lower-court judge who had said that surreptitious investigations conducted by undercover agents who converse with "friends" constitute "more serious impos[itions]" than do interrogations conducted by government agents known by the accused to be government agents.[289]

Stuntz acknowledges the harm of undetected spying by exempting two "paradigmatic" encounterless searches from his thesis: house searches and wiretaps.[290] But why exempt them? Stuntz explains that the contents of houses and phone conversations are "personal"[291] and "plausibly distinguishable from the kinds of information the state seeks for regulatory purposes,"[292] though elsewhere he admits that "[t]here is no privacy-based reason for treating [regulatory] searches differently from police searches; the overbreadth phenomenon [or what Michael Seidman calls 'collateral damage'[293]] is the

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[286] *Id.* at 612b, at 295.

[287] United States v. Karo, 468 U.S. 705, 735 (1984) (Stevens, J., concurring in part and dissenting in part).

[288] 377 U.S. 201 (1964).

[289] *Massiah*, 377 U.S. at 206 (quoting United States v. Massiah 307 F.2d 62, 73-74 (2d Cir. 1962) (Hays, J., dissenting).

[290] Stuntz, *supra* note 14, at 1060-62.

[291] *Id.* at 1063.

[292] *Id.* at 1061.

[293] *See* Louis Michael Seidman, *The Problems with Privacy's Problem*, 93 MICH. L. REV. 1079, 1086-92 (1995).

same in both settings."[294] Despite this wrinkle, for Stuntz it makes sense in privacy terms that police need a very good reason to raid our houses or intercept our phone calls.

Stuntz's thesis thus leaves some room for the protection of privacy without coercion, but only for "good secrets," which concern what we do and keep in our houses and what we say on the phone, as opposed to "bad secrets," which concern those outside-the-house facts like the concealment of a sandwich in a paper sack.[295] But even the house loses some of its luster in Stuntz's regime. For example, Stuntz says that *Arizona v. Hicks*[296] depicts the Court's obsession with secrecy or what I have here been referring to as "hiddenness."[297] *Hicks* instantiates the "plain view" doctrine, which allows police to seize evidence as a bonus if they discover it while lawfully searching for or seizing something or someone else.[298] In *Hicks*, the Court held that a police officer who lawfully entered Hicks's apartment soon after Hicks had shot his neighbor through the floor could look only for Hicks, his victims, or his weapons absent independent probable cause to look for something else.[299] While there, the officer also peeked under Hicks's turntable to get the serial numbers to find out if the two fancy stereos in the "squalid" apartment were stolen, which they were.[300] Because the officer lacked probable cause that the stereos were stolen, moving a turntable for inspection was an unjustified search.[301] As a result, Hicks got away with theft, but not with the stereos.[302]

Stuntz objects to *Hicks*, which he reads as saying that "each marginal search, each additional place where the officer casts his eye, represents a separate issue and ought to be sepa-

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[294] *See* Stuntz, *supra* note 14, at 1039.
[295] *Id.* at 1063.
[296] 480 U.S. 321 (1987).
[297] *See* Stuntz, *supra* note 14, at 1022-23.
[298] *Id.* at 1023.
[299] *Hicks*, 480 U.S. at 325-26.
[300] *Id.* at 323.
[301] *Id.* at 326.
[302] *Id.* at 324.

rately justified."[303] We are wrong, Stuntz insists, to perpetuate a doctrine that privileges trivial dignitary interests (i.e. the secrecy of the underside of your stereo) over non-trivial interests (i.e. the right to be free from police coercion) which, like Hicks himself, was absent.[304] Thus for Stuntz, what matters in *Hicks* is not the officer's roving eye, but "the legality of the search of the apartment in general."[305]

But searches are *never* general. Surely Stuntz is not saying that the right to enter a house is the right to ransack it. Stuntz knows that searches must be carried out, not just initiated, in a reasonable manner.[306] Stuntz also knows that an officer can cast his eye anywhere he wants—that's why we call it "plain view."[307] To be sure, police had good cause for being in Hicks's apartment;[308] but unless they thought Hicks, a victim, or a gun[309] was hiding beneath or behind the turntable, they were no more justified in moving the stereo than they would have been in pumping Hicks's stomach or looking for him in a jewelry box. The serial numbers were hidden, so the "view" was not at all "plain."[310] Perhaps what annoys Stuntz is that where the police looked, like an "open field," was not "likely to contain the sorts of things ordinary people wish to keep to themselves."[311] But how could police know that nothing private would be there? A turntable can hide a love letter or an ACLU membership card, each bespeaking "those telltales of personality" that in no sense trivialize what we mean by "private."[312]

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[303] Stuntz, *supra* note 14, at 1023.

[304] *See* State v. Hicks, 707 P.2d 331, 332 (Ariz. Ct. App. 1985) (noting that the apartment manager opened door for police, who "[i]n a quick search . . . determined that no people were in the apartment."), *aff'd*, 480 U.S. 321 (1987).

[305] *See* Stuntz, *supra* note 14, at 1023.

[306] *Id.* at 1066-68 (pointing out that the court in *Anderson v. Creighton*, 483 U.S. 635 (1987), and many commentators, failed to discuss the Fourth Amendment implications of the officer's conduct during the search).

[307] *Id.* at 1023.

[308] *See Hicks*, 480 U.S. at 324.

[309] *See* Warden v. Hayden, 387 U.S. 294, 299-300 (1967).

[310] *Id.* at 324-25.

[311] *See* Stuntz, *supra* note 14, at 1030 (stating that "houses, unlike fields, *do* contain things that most people want to keep to themselves").

[312] *See* Dripps, *supra* note 22, at 920-21.

Although the meaning of "private" is wider than the meaning of "secret" (a crucial distinction noted in a dissent by Justice Brennan the Term *before Katz* was decided),[313] Stuntz uses the terms interchangably. Stanley Cavell employs a less stingy or more ordinary definition of the private when he writes that "[a] private conversation is one that I do not want others to hear, not one they necessarily cannot hear. My private entrance is one through which I can invite others; in principle, anyone in the world can be as well acquainted with it as I am."[314] While Cavell's reflections are meant to capture what he calls a "metaphysical" as opposed to "political" sense of privacy, still he reminds us that privacy largely depends on the intentions of the interest-holder. We may safely assume that, to paraphrase Edward Shils, those who intend to conceal mean to control the outward flow of information about themselves, regardless of whether the information is embarrassing[315] and

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> The evil of the search lies not in the discovery of criminal evidence, but in the concomitant exposure to the government, and thereby the world, of all those telltales of personality revealed in any place we take for private. To view the exclusionary rule as a personal right is to constitutionally enshrine the pistol in the basement or the cocaine in the coffee can, and to ignore as immaterial the music on the stereo, the books on the shelf, and the fading letters in the bedroom bureau drawer.

Id.

[313] *See* Lopez v. United States, 373 U.S. 427, 449 (1963) (Brennan, J., dissenting).

> The other half of the Government's argument is that Lopez surrendered his right of privacy when he communicated his "secret thoughts" to Agent Davis. The assumption, manifestly untenable, is that the Fourth Amendment is only designed to protect secrecy. If a person commits his secret thoughts to paper, that is no license for the police to seize the paper; if a person communicates his secret thoughts verbally to another, that is no license for the police to record the words. On Lee certainly rested on no such theory of waiver. The right of privacy would mean little if it were limited to a person's solitary thoughts, and so fostered secretiveness. It must embrace a concept of the liberty of one's communications, and historically it has.

Id. (citation omitted).

[314] CAVELL, *supra* note 13, at 330; *see also* SISSELA BOK, SECRETS: ON THE ETHICS OF CONCEALMENT AND REVELATION 288 n.20 (1982) (collecting sources on relation of secrecy to privacy).

[315] *See* Edward Shills, *Privacy: Its Constitution & Vicissitudes*, 31 LAW &

regardless of the unimagined risks that eavesdropping and betrayal pose.[316] But generous conceptions of privacy like Cavell's, Shils's and Brandeis's familiar "right to be let alone,"[317] or even the one I pieced together above from *Florida v. Riley*,[318] are too open for Stuntz, too hard to pin down. They are, as such, too easily converted into an obsession over what police may see and hear while disengaging us from what really matters: physical intimidation.

At its worst, privacy is a greedy concept that promotes hypersensitivity or an unjustified wish to manipulate and defraud others. Here I borrow from Judge Posner, who, like Stuntz, is less skeptical of seclusional claims, i.e., our right to retire from the public to the private. For Posner, again, the difference between police bursting into your living room on the one hand and tapping your telephone on the other is the difference between disturbing your seclusion as opposed to (merely) discovering your secrets.[319] Posner is deeply skeptical of secrecy or informational claims that do nothing but enhance one's reputation by keeping others in the dark unless the secret or information has some innovative or entrepreneurial component relevant to the capture of competitive market advantages.[320] If "good" privacy claims are seclusional and "bad" privacy claims are strictly secretive or informational and provide no

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CONTEMP. PROBS. 281, 290 (1966).

[316] *See* United States v. White, 401 U.S. 745, 752 (1971).

> Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize. But if he has no doubts, or allays them, or risks what doubts he has, the risk is his.

Id.

[317] Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

[318] 488 U.S. 445 (1989). In *Riley*, Justices O'Connor, Blackmun, Brennan, Marshall, and Stevens agreed we have a right to be free from unusual modes of surveillance. *Riley*, 488 U.S. at 452-68 (O'Connor, J., concurring and Brennan & Blackmun, JJ., dissenting).

[319] *See* POSNER, *supra* note 273.

[320] *See* Richard S. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 403 (1978).

competitive advantage in a market, then does that mean closed containers such as cars, pockets, paper bags or cigarette packets ordinarily are not the sources of seclusional interests? Because Stuntz thinks these places are about convenience, not privacy, he would replace privacy protection in containers with an emphasis on what police do to us (to our bodies) to reveal the contents of those containers.[321]

Obviously we are at an impasse: I say closed containers are private, in part because coercion is not the Fourth Amendment's only worry; Stuntz says they are not private because privacy invasions tend to matter only when they are occasioned by police coercion.[322] If we treat this as an empirical problem in need of laborious questioning, Slobogin's survey strongly implies that closed containers are private.[323] But because Stuntz's aim is to impose coherence on modern constitutional law, he must foreclose on the privacy of closed containers.[324]

He strongly suggests, perhaps inadvertently, that suspicionless closed-container searches are okay so long as there is no coercion involved, that is, so long as the suspect is absent when the search takes place. But it is hard to believe that Stuntz would go so far as to say that a police officer who, in a place he or she has a right to be, may on a whim open Robinson's cigarette package,[325] Belton's zippered jacket pocket,[326] Lafayette's shoulder bag,[327] or Jimeno's paper sack.[328] This, by the

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[321] *See* Stuntz, *supra* note 14, at 1065-66; William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 393 (1995) [hereinafter *Substantive Origins*].

[322] *See* Stuntz, *supra* note 14, at 1065-66.

[323] Slobogin & Schumacher, *supra* note 121, at 737-64 (confirming that while we place the most cherished privacies of life in our phone conversations and our houses, which contain our books and papers, searches of office doors, trunks of cars, footlockers found in cars, and of schoolchildren's lockers were also rated as significantly invasive).

[324] *See* Stuntz, *supra* note 14, at 1068-78; *Substantive Origins*, *supra* note 321, at 433-42.

[325] *See* United States v. Robinson, 414 U.S. 218, 223 (1973).

[326] *See* New York v. Belton, 453 U.S. 454, 462 (1981) (holding that power of arrest included power to search arrestee's jacket).

[327] *See* Illinois v. Lafayette, 462 U.S. 640, 646-47 (1983) (deciding search of

way, is what Officer Biro did in *United States v. Ceccolini*.[329] Was Biro's snooping an unjustified search because it was an *envelope* in which he looked?[330] So there really are private and non-private, worthy and unworthy closed containers? That cannot be (and in fact is not) the law.[331] Please recognize that Stuntz is not duplicating Scalia's position in *California v. Acevedo*[332]—that container searches should take place on probable cause without regard to the nature of the container.[333] Instead, Stuntz's coercion theory requires no antecedent suspicion at all to authorize encounterless or nonconfrontational invasions of closed containers.[334]

3. Telling a Search from a Non-search

This impasse could be resolved by upgrading the role of intentions in assessments of when a search takes place. It really makes little difference what privacy is used for, though we sometimes do lose sight of that. For example, in discussing what she calls an "innocence model" of Fourth-Amendment privacy, Sherry Colb presupposes that privacy does not protect criminal activity.[335] In other words, only the innocent have

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arrestee's bag was a valid inventory search).

[328] *See* Florida v. Jimeno, 500 U.S. 248, 250 (1991).

[329] 435 U.S. 268 (1978).

[330] *See Ceccolini*, 435 U.S. at 270. The unlawfulness of Biro's search of Ceccolini's envelope was uncontested. The Supreme Court ruled that a fruit of that illegality—the discovery of a witness named Lois Hennessey—was admissible despite that illegality. That ruling owes to what dissenting Justice Marshall criticized, in obvious frustration with the majority, as a hypothetical inevitable discovery rule. *Id.* at 287-88 (Marshall, J., dissenting).

[331] *See* United States v. Ross, 456 U.S. 798, 822 (1982) ("[A] constitutional distinction between 'worthy' and 'unworthy' containers would be improper"); Robbins v. California, 453 U.S. 420, 426 (1981) (holding that the Fourth Amendment "protects people and their effects, and it protects those effects whether they are 'personal' or impersonal' . . . . Once placed within such a container, a diary and a dishpan are equally protected . . . .").

[332] 500 U.S. 565 (1991).

[333] *See Acevedo*, 500 U.S. at 584 (Scalia, J. concurring).

[334] *See generally* Stuntz, *supra* note 14, at 1068-78 (presenting applications of the coercion thesis to search and seizure cases).

[335] Sherry Colb, *Innocence, Privacy, and Targeting Fourth Amendment Jurisprudence*, 96 COLUM. L. REV. 1456, 1477 (1996).

privacy. Once we "abuse" our privacy for criminal purposes, as she puts it, our privacy is "forfeited."[336] Thus, I take it that on her account, if I was working preparing my federal-income taxes in my study, the activity would be private until I decided to fudge a deduction, at which point the activity would cease to be private, though still occurring in my study. You can see already what I think of this idea: indeed, privacy would do few of us any good at all unless we were in some way embarrassed by what we were doing. That is, abuse of seclusion is what privacy is *for*. A crime committed in seclusion is done in private; it is just that once police have knowledge of the criminal activity, they are justified in invading the private realm for crime-control purposes.

If our goal is to find out without first violating someone's privacy whether we have enough suspicion about them to justify our violating their privacy, then one move we can make is to call as much action as we plausibly can "nonsearches." This move is expressed in the Court's cases that rule, to name just a few, that on a whim, police can: have drug-sensitive dogs sniff your luggage, hover over your property in airplanes or helicopters, sift through your garbage, study your bank and phone records, trespass onto your property, shine flashlights into your car or barn, use your friends as undercover agents, and track your movements with transmitters hidden in your effects (at least to a point). Yet in each of these cases there is no doubt that police intended to overcome the hiddenness of their targets, who had until then kept their activities secluded.

Two decades before *Katz*, bewitched by its own trespass doctrine, the Court held in *McDonald v. United States*[337] that when D.C. Vice Officer Ogle (I kid you not) mounted a chair and peeked through the transom into a leased room, he conducted no search.[338] As Judge Miller put it for the lower court: "The only problem in the case is whether looking through the transom amounted to an unlawful search. It was not gen-

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[336] *See id.* at 1501.
[337] 335 U.S. 451 (1948).
[338] *McDonald*, 335 U.S. at 453-54.

tlemanly to spy on McDonald in that manner, but his constitutional rights were not thereby invaded."[339] As interesting a case as *McDonald* is (I recommend particularly Justice Jackson's radical notion of standing expressed in his separate opinion), my interest in it is in what the Court would say about this sort of spying today. Spying is not very gentlemanly, to be sure. But it is, one could say, very professional. Indeed, I recall when the law school where I work amended our Student Honor Code in response to a hate-speech incident that was not covered by our regulations, which read like a version of the California Penal Code, with the same sorts of defenses and terminology, e.g., intoxication, specific intent, and so on. One critic of the Committee's recommended amended Code said that it smacked more of a Gentleman's Club Charter than a Professional Code of Conduct. As criticisms go, however, this one struck me as flimsy: who would you rather be judged by, after all, a gentleman or a professional? I, for one, would much rather take my chances with a gentleman any day.

In other words, I am impressed by Judge Miller's choice of words here, words which condemn Officer Ogle for his being ungentlemanly, a standard that regrettably had no constitutional force whatsoever in 1948. After *Katz*, however, would not the ungentlemanly or uncivilized mode of action—here, spying—have point in constitutional law? It is an unreasonable, even antisocial (though obviously legal) mode of action if there ever were one. This is, I take it, precisely the upshot of *Bond*. Certainly common-carrier personnel or fellow travelers could conceivably conduct a tactile inspection of your bag stored in an overhead rack, but what would you say to them if they did? Again, they are not merely moving your bag or re-arranging the other luggage to make room for their own: they are inspecting your bag. And to what end, exactly? To find out what you have hidden from them, I assume. Or, put slightly differently, how would they feel if you saw them performing this nosy tactile inspection? (In a wildly different but nonetheless apposite

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[339] McDonald v. United States, 166 F.2d 957, 958 (D.C. Ct. App. 1948), *rev'd*, 335 U.S. 451 (1948).

context, my civil procedure professor dubbed this the "spotlight theory," which holds that the rightness of your positions— the rightness of what you do—can be assessed by imagining that they are being viewed).

I am quite sure that Officer Thielen (who peeked through the bushes through the apartment blinds in *Minnesota v. Carter*)[340] in his role as private actor would be unlikely to stick his nose up against a neighbor's window to see through a crack in the blinds, nor would he, were he in his own home, likely to write off discovering someone doing the same to him as a "risk" of apartment life. Just as no one would describe peeking through blinds as "seeing" or "seeing while standing in a lawful place," no one would describe what federal agents did in *Katz* as "hearing." To do so cuts off the action from its intention, plan or operation-order. Application of *Katz* in "what is a search" cases strikes me as a straightforward matter: did the putative search victim demonstrate the intention to conceal his activities (here, possession of an incriminating thing or fact)? If so, then did police intend to defeat (and succeed in defeating) that intention?

This sort of assessment of responsibility based on the intentions both of victim and wrongdoer is nothing new to criminal law (to law more generally, or, for that matter, to the world).[341] Theft law turns on the intentions both of the thief to permanently deprive the prior possessor and on whether the prior possessor consented to the would-be thief's acquisition. The illegality of coerced sexual exchanges also turns on intentions, defined by the same relation between the intentions of victim and wrongdoer. These are not isolated instances: the whole idea of self-defense demands that we attend equally to the actions of both victim and defendant.

While we can easily reach agreement that under this approach Katz manifested his intention to exclude the uninvited

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[340] *See supra* notes 148-50 and accompanying text.

[341] *See generally*, DANIEL YEAGER, J.L. AUSTIN AND THE LAW: EXCULPATION AND THE EXPLICATION OF RESPONSIBILITY (forthcoming 2005) (discussing criminal law and its association with responsibility for human action).

ear while federal agents simultaneously manifested their intentions to overcome his privacy by electronically eavesdropping on his conversations, his is a rather easy case under the approach that I have identified here. Perhaps a greater demand on assessing the role of intentions in these "what is a search" cases is provided by what I, for one, found to be a riotously funny episode of *Seinfeld*, though its particular hilarity was lost on those with whom I viewed it. In that episode, when George learns that Jerry's new object of affection—Laura the deaf tennis lineswoman (played by the radiant Marlee Matlin)—reads lips, he persuades her to "read" a conversation at an upcoming party, where George hopes to find out why a woman there (Gwen) had broken up with him. As we know, most problems with understanding are not acoustical, but there are some difficulties that here quite literally are, at least if we count them as misreadings rather than as projections. For example, Laura reads "sex" when Jerry says "six." These snags aside, the plan misfires and ends badly, of course, for George, who, for anyone who takes *Katz* at all seriously, got what he deserved for his skepticism, or more precisely, for his play at penetrating the privacy of others. Ungentlemanly? Obviously. This special skill of Laura's not only is extraordinary, but just as importantly, is one which she knows well that others cannot know when to be on guard against. Is lip-reading a privacy invasion? Would it pass for argument to say that it is a risk of living in a world where a tiny percentage of people can read lips? But so is World War III a risk (perhaps an infelicitous example)—but how do I guard against it? Nor is it especially persuasive to refer to it as her mode of "hearing." That's true enough, as far as it goes, but that is the same sort of highly abstract or generalized description that would label *Ciraolo* and *Riley* instances of "flying" as opposed to "spying." That may be how she hears, but that does not mean that her powers, however necessary they may be to her flourishing, cannot be abused.

So what do we do with, say, the paper lunch sack on the floorboard of Jimeno's car? Is it private or not? Stuntz insists that the sandwich's presence in the sack is a matter of convenience, not privacy. Not only could the same be said about

much that is situated in our pockets, our satchels, our cars and our homes, but worrying about whether secluding an item or information is an assertion of privacy as opposed to a matter of convenience will only get us into inquiries into motives: *why* did you keep your drugs in the sack? Such inquiries strike me as unlikely to bear fruit when weighed against the fact that the drugs were, after all, *in* the sack. Whether concealing something may have other benefits or even purposes does not defeat it as an act of concealment. Opening it is a penetration of the private world. I can see no other way to see this serious matter.

V. CONCLUSION

While the Supreme Court keeps enjoining litigants from making intentions relevant to Fourth Amendment discourse, it is difficult to abide by an injunction whose terms you do not comprehend. The situation is far from hopeless, however. Getting to the point where we can assess whether an action in question really is constitutional requires a confrontation with the officer's account of his intentions, a confrontation that the Supreme Court threatens to preclude in *Whren* and replicated by both majority and dissent in *Bond*. If *Bond* is an optimistic decision from the standpoint of *Katz*, then its repudiation of the function of intentions in assessing police actions is its most obvious drawback. Intentions really do get a bad rap in the Supreme Court.

The Justices' concerns about subjectivity would be well founded if such inquiries really did require mind reading—encounters with inner, hidden, secret selves. If that is what confrontations with intentions entail, as so often it is suggested they do,[342] then they *should* be enjoined. But confrontations with intentions are not attempts to penetrate pri-

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[342] *See, e.g.*, Diana Roberto Donahoe, *"Could Have," "Would Have:" What the Supreme Court Should Have Decided in* Whren v. United States, 34 AMER. CRIM. L. REV. 1193, 1200-01 (1997) ("Although pretext, by definition, entails an assessment of motive, the Supreme Court has clearly held that an inquiry into the officer's subjective state of mind is inappropriate. This rule makes sense when one considers the difficulty of reading the officer's mind as he makes quick decisions on the street.") (footnotes omitted).

vacy; they are attempts to evoke responses about how things were with the person whose intentions we question. And by asking that they explain how things were with them—what they were doing, what the plan was, what remained incidental, what went wrong—we are asking them to elaborate the public, observable world when we feel the need to make sense of an action that strikes us as unusual or untoward. Without leaving room in constitutional criminal procedure for so central, so homely an activity as the proffering of an excuse, we impede the entire project of regulating police, whose actions can be neither meaningfully praised nor meaningfully blamed if they cannot be understood.

By arguing here for the relevance, even centrality, of intentions in any regime directed at regulating the police, I am not suggesting that motives themselves are hidden or inner and should, for that reason, be banished from criminal-procedure discourse. They are not. Motives themselves are directed in a way that they can be assessed, given that they tend to culminate in the realization or setting up of a plan. It is not, therefore, that motives are interior any more than intentions are. The problem with motives, that is, what accounts for their limited relevancy to evaluations of human action, is that motives are by definition external to the action: their "directedness" points the actor at other actions, other plans, other upshots. And given that in moral discourse, be it in the context of law or in garden-variety settings, we are generally more concerned with what people are doing than why they are doing it (what they hope to get out of it), the Supreme Court is correct to deeply discount the importance of motives in evaluations of police practices. What is left now is only to see the extent to which the criteria of motives diverge from those of intentions; to acknowledge as much is essential in assessing whether a search or seizure is pretextual as opposed to unconstitutional, or here, whether a search takes place at all, a serious matter for the Fourth Amendment.

The *James Otis* Lectures

ANNUAL LECTURE SERIES ON SEARCH AND SEIZURE PRINCIPLES

This lecture series is fittingly named after the man who not only ignited the American Revolution, but whose very words in opposition to the writs of assistance inspired the Fourth Amendment, James Otis.

Born in Great Marshes (now West Barnstable), Massachusetts, the eldest of thirteen children, Otis would devote his life to the law, as his father and grandfather had done before, becoming one of the most revered trial advocates and legal orators throughout Massachusetts, earning him the coveted position as Advocate General of the Vice-Admiralty Court at just thirty-one years of age, a position he would later resign to champion the cause against the Crown's arbitrary issuance of writs of assistance. The writs were general search warrants

that permitted the authorities to search anywhere they pleased for any reason–or for no reason. In one of the first defiant stands against British authority in the Colonies, Otis attacked the writs as "'against the fundamental principles of law.'"[1] He asserted, among other things: "A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege."[2]

John Adams, who witnessed Otis's impassioned oration, afterward declared: "Every man of an immense crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born."[3]

Although Otis may have lost his case before the Massachusetts Superior Court in Boston's Old Town Hall that day, he gained a place in history. In that case, "the American tradition of constitutional hostility to general powers of search first found articulate expression."[4] It was Adams, so inspired by Otis's words, who later drafted Article Fourteen of the Massachusetts Declaration of Rights of 1780, which served as the model for the Fourth Amendment.

Otis would become one of the greatest Patriots our country has ever known. Though eventually reduced to insanity and ultimately silenced by a bolt of lightning, James Otis will

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[1] TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 36-37 (1969) (quoting 2 LEGAL PAPERS OF JOHN ADAMS 125 (L. Kinvin Wroth & Hiller B. Zobel eds., 965).

[2] *Id.* at 37 (quoting 2 LEGAL PAPERS OF JOHN ADAMS, *supra* note 1, at 142).

[3] NELSON B. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION 59 (1937).

[4] M.H. SMITH, THE WRITS OF ASSISTANCE CASE 7 (1978).

forever remain first among America's Fourth Amendment advocates.

Thomas K. Clancy[*]

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"A FLAME OF FIRE": THE FOURTH AMENDMENT IN PERILOUS TIMES

John M. Burkoff[*]

The Fourth Amendment to the United States Constitution is, of course, one of the principal constitutional checks on any governmental inclination to overreach in its otherwise lawful and necessary crime-control and policing activity. What is more, the Fourth Amendment was fully intended to—and it actually *does*, at least to some modest if undeterminable degree—*prevent* law enforcement agents and others acting on their behalf from intruding unreasonably, without appropriate justification and legal process, into the lives of Americans and others living under our jurisdiction.

From this perspective, the Fourth Amendment is, appropriately, *an impediment* to some of the most zealous of law enforcement activities, and this is the case even when that activity is entirely innocent and well-intentioned, where the Government is acting strictly in an attempt to capture criminals and/or to deter criminal activity. This is also the case even when the result of the Fourth Amendment's application is that some guilty persons end up going free. As Justice Robert Jackson made this point for the Supreme Court in 1948, more than half a century ago,

> [i]t is said that if . . . arrests and searches cannot be made [whenever criminal activity is thought to be present], law enforcement will be more difficult and uncertain. But the

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> forefathers, after consulting the lessons of history, designed our Constitution to place obstacles in the way of a too permeating police surveillance, which they seemed to think was a greater danger to a free people than the escape of some criminals from punishment.[1]

Indeed, Justice Jackson, a former Attorney General and Solicitor General of the United States and a Supreme Court justice, who left the Supreme Court for its entire 1945 Term in order to serve by presidential appointment as Chief American Prosecutor at the Nuremberg Tribunal to try captured senior Nazi leaders for genocide and war crimes, had the following to say, after returning from Nuremberg, about the importance of Fourth Amendment freedoms to our American democracy:

> These . . . are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.[2]

The Warrant Clause of the Fourth Amendment, in particular, serves this purpose of attempting to assure us that law enforcement officers and agents will act *reasonably*, with appropriate antecedent justification and due legal process, before intruding into our lives or the lives of our neighbors. It provides simply that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to

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[1] United States v. Di Re, 332 U.S. 581, 595 (1948).

[2] Brinegar v. United States, 338 U.S. 160, 180-81 (1949) (Jackson, J., dissenting).

be seized."[3]

The inclusion of this prohibitory language in the Fourth Amendment, creating severe restrictions on law enforcement behavior that are not found in most countries of the world, was, of course, not simply historical happenstance. To be sure, this is language that followed the English common law in existence at the time of the drafting of the Fourth Amendment and the adoption of the Bill of Rights. But, more important still, it is language that reflected—and continues to reflect, as Justice Jackson pointed out—our country's express and profound constitutional commitment to individual freedom from unjustified and unreasonable government searches and seizures.

The drafting and enactment of the Warrant Clause and the Fourth Amendment itself followed as the direct result of critically important events that took place in the American colonies, events that led to the Revolutionary War and to the birth of the United States of America, and events that took place, significantly, in perilous times.

One of the most important of the specific triggering events that led to the founding of our nation, forged out of the fires of the American Revolution, and that led to our constitutionalized commitment to individual rights and liberties took place more than two hundred-fifty years ago, in 1761, in the Massachusetts Bay Colony. On October 25, 1760, the English sovereign, King George II, died.[4] Under English law applicable to the American colonies at that time, the so-called "writs of assistance," used as general warrants by English customs officers in the colonies, expired six months after the reigning King or Queen died.[5] As a result, the customs officers in the Massachusetts Bay Colony had only until April 25, 1761 to obtain new writs of assistance, otherwise their power to execute such "general warrants" lapsed.[6]

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[3] U.S. CONST. amend. IV.

[4] William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning, 602-1791 763 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Services).

[5] *Id.*

[6] *Id.*

A general warrant is a search warrant that essentially entitles its possessor to search whoever, wherever and whenever the possessor wants, without any necessity for a showing of probable cause or any other sort of antecedent justification for the search, without any particularized description of where the possessor of the warrant intends to search or for what he or she intends to search, without any judicial authorization or supervision of the execution of the warrant whatsoever, and without any right of refusal on the part of the individuals whose bodies or homes or possessions are the target of the warrant.[7]

The writs of assistance in colonial America were general warrants.[8] These writs were an adaptation of a form of general warrant then in common use in England, tailored for use in the American colonies principally to root out our forefathers' penchant for smuggling without paying the requisite steep and, in the colonists' view, profoundly unfair English taxes and import fees.[9] These writs empowered their authorized enforcing agents—usually, but not always, Customs officials in the colonies—to rummage through individuals' homes and offices and possessions, searching whenever, wherever, and whomsoever they desired.[10]

Suffice it to say that these writs were hated and reviled by the American colonists. Execution of these writs in the 1750s and 1760s in an attempt to enforce what were perceived in the Colonies to be profoundly unjust English trade laws resulted in, to put it mildly, anger, resentment and hostility on the colonists' part.[11]

But, as lawyers, would-be lawyers and judges, we all know that there must be, inevitably, another side to the story. To the English colonial authorities, the writs of assistance were viewed as critical and essential law enforcement tools.[12] In 1755, the Colonial Governor of the Massachusetts Bay Colony

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[7] *Id.* at cii.
[8] *Id.* at 762-63.
[9] *Id.* at 762, 602-03.
[10] *Id.* at 762-63.
[11] *Id.* at 684-92, 721-46.
[12] *Id.* at 773.

began the practice of issuing such writs of assistance to customs officers in an effort to seek to stem the torrent of smuggling by the colonists into the colonies from French Canada in violation of the existing criminal laws of the time.[13] Nothing else seemed to work to deter this lawlessness. Remember, however benign (or even noble, romantic and swashbuckling) such smuggling might appear today, viewed through the refracting prism of the subsequent revolutionary events, at the time, this was just plain criminal wrongdoing.

To deter such wrongdoing, five years prior to the time that King George II died in 1760, the English colonial authorities began a new and vigorous law enforcement campaign to stop the smuggling into the Colonies from the French West Indies.[14] The writs of assistance were deemed by the colonial government to be an absolutely critical part of undertaking that law-and-order campaign.[15] Indeed, if the campaign failed, the threat to English sovereignty over the American Colonies was viewed as being at risk.[16] With the benefit of hindsight, we now know that the belief that a risk of revolution existed was hardly a frivolous one.

When King George II died and the writs of assistance were slated soon to expire, the Surveyor General of Customs in the Massachusetts Bay Colony petitioned the Superior Court of the Colony to issue, as he put it, in the "usual" fashion, new writs of assistance for his use and for the use of his subordinate officers.[17] A number of prominent merchants from the towns of Boston and Salem, however, got together to oppose that "usual" request, and, ultimately, the sides were drawn for a vigorous court challenge to, and a corresponding defense of, the English colonial authorities' use of the hated writs of assistance.[18]

Thus enter stage left, the young James Otis, Jr. These merchants opposed to the writs on behalf of themselves and the

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[13] *Id.* at 758.
[14] *Id.* at 763.
[15] *Id.*
[16] *Id.* at 773.
[17] *Id.* at 764.
[18] *Id.*

other colonists hired Otis, then a mere thirty-five years old, to argue their position in this pivotal case.[19] Born in 1725, Otis had studied as a boy with the minister of his parish, and subsequently he attended Harvard College from 1739 to 1743, starting when he was only fourteen years old and graduating at the ripe old age of eighteen[20]. Otis then served as a legal apprentice in Boston for a number of years, finally beginning his own legal practice in Plymouth in 1748 at the age of twenty-three.[21]

Having gained some prominence, Otis was also serving as Acting Advocate General for the Massachusetts Bay Colony in 1760.[22] But when he was asked to argue the writs of assistance case on the Colony's behalf as Advocate General, he not only declined, he responded by stepping down from that office.[23] Subsequently, Otis agreed instead to argue the case for the colonists in the same matter, the case *against* the writs of assistance.[24]

James Otis took a lot of political and personal heat as a result of this momentous decision.[25] It is well to bear in mind that what makes him appear heroic today, once again in the flattering light of hindsight and a successful revolution, was neither so self-evidently wise nor commendable to the entire community in which he lived at the time. But Otis himself had no doubts that he was doing precisely the right thing.[26] In explaining his conduct for the public record, he declared to the court hearing the writs of assistance case that

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[19] *Id.* at 765. It is unclear, parenthetically, what the actual name of this case was. *Id.* at 766 n.26. Various contemporaneous accounts lead us to believe that it was either *Paxton's Case*, *Cockle's Case*, or *Petition of Lechmere*. *Id.* The court records relating to this matter have never been found, and "in a fit of the mental disorder that overtook him in middle age [Otis] burnt all of his letters and papers he could lay his hands on." M. H. SMITH, THE WRITS OF ASSISTANCE CASE 312 (1978).

[20] SMITH, *supra* note 19, at 312.

[21] *Id.*

[22] *Id.* at 315.

[23] *Id.* at 316.

[24] *Id.*

[25] *Id.*

[26] *Id.*

> I was sollicited [sic] to argue this cause as Advocate-General, and because I would not, I have been charged with a desertion of my office; to this charge I can give a very sufficient answer, I renounced that office, and I argue this cause from the same principle; and I argue it with the greater pleasure as it is in favour of British liberty . . . . And as it is in opposition to a kind of power, the exercise of which in former periods of English history, cost one King of England his head and another his throne. I have taken more pains in this cause, than I ever will take again: Although my engaging in this . . . has raised much resentment[,] . . . I think I can sincerely declare, that I cheerfully submit myself to every odious name for conscience sake . . . . Let the consequences be what they will, I am determined to proceed. The only principles of public conduct that are worthy [of] a gentleman . . . are[] to sacrifice estate, ease, health and applause, and even life itself to the sacred calls of his country. These manly sentiments in private life make the good citizen, in public life, the patriot and the hero.[27]

Of course, subsequent events proved him right and the argument that Otis made in this case has forever cast him as *both* a patriot and a hero, indeed, one of the first truly *American* patriots and heroes. It is also worthy of note that, although he was offered a large fee to argue the writs-of-assistance case, Otis declined to receive any payment at all.[28] Instead, he undertook the representation strictly on a *pro bono* basis.[29] "[I]n such a cause," he declared, "I despise a fee."[30]

The actual oral arguments in the writs of assistance case were heard in the Superior Court of the Colony for three days in February of 1761, and then again for one day in November of that same year.[31] The lawyers argued for and against the renewed issuance of the writs of assistance on any number of grounds: some statutory and some constitutional, some dry and

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[27] *Id.*
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.* at 233.

technical and some eloquent and profound. However, it is the eloquence and profundity of James Otis Jr.'s *constitutional* arguments, with his dramatic appeals to notions of basic human rights and basic human entitlements, which struck a responsive chord in the colonies in 1761, and which cause him to be remembered and honored still today as a result of these events that took place in that case, argued more than two centuries ago.

Otis contended not only that the use of general warrants was inherently an unjust and an unconstitutional practice, but that such warrants were, moreover, in language subsequently quoted and followed by the United States Supreme Court, "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book . . . ."[32]

Execution of such writs, Otis added and the Supreme Court has seconded, in oft-quoted language, placed "the liberty of every man in the hands of every petty officer."[33] Indeed, Otis eloquently and forcefully continued:

> [O]ne of the most essential branches of English liberty, is the freedom of one's house. A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle.—This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please—we are commanded to permit their entry—their menial servants may enter—may break locks, bars and every thing in their way—and whether they break through malice or revenge, no man, no court can inquire—bare suspicion without oath is sufficient.[34]

Even if the legislation creating writs of assistance had been enacted properly, Otis concluded, "[n]o Acts of Parliament can establish such a writ . . . . '[A]n Act against the [English] Constitution is void: an Act against natural Equity is void.'"[35]

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[32] Boyd v. United States, 116 U.S. 616, 625 (1886) (quoting COOLEY'S CONSTITUTIONAL LIMITATIONS 301-03).

[33] *Id.*

[34] SMITH, *supra* note 19, at 344.

[35] *Id.* at 364.

Of course, to no one's surprise, James Otis lost these arguments.[36] He failed in his attempt to stave off the renewal of the writs of assistance. They were, in the event, renewed, and their oppressive use, and the colonists' abhorrence of them, continued. *But*, although Otis lost the battle, *we* ultimately won the war, quite literally. The arguments made by Otis had a dramatic, even a *cataclysmic*, effect on the colonies at the time and, in due course, on the path of our history.

John Adams, then a twenty-six year-old spectator, watching from the gallery as James Otis argued his—*our*—case against the writs of assistance, later recollected in his diary that:

> *[Otis] was a flame of Fire!* With the promptitude of Classical Allusions, a depth of Research, a rapid Summary of Historical Events and dates, a profusion of legal Authorities, a prophetic glare . . . of his eyes into futurity, and a rapid Torrent of impetuous Eloquence, he hurried away all before him; *American Independence was then and there born.* The seeds of Patriots and Heroes to defend . . . the vigorous Youth, were then and there sown. Every man of an [immense] crowded Audience appeared to me to go away, as I did, ready to take up Arms against Writts of Assistants [sic]. *Then and there was the first scene of the first Act of Opposition to the arbitrary Claims of Great Britain. Then and there the child Independence was born. In fifteen years, i.e. in 1776, he grew up to manhood, declared himself free.*[37]

Adams's "flame of fire" reference to James Otis's oratory is, parenthetically, somewhat ironic given the fact that Otis ultimately died as a result of being struck by lightning, a genuine "flame of fire."[38]

These heated atmospherics notwithstanding, more than a

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[36] Cuddihy, *supra* note 4, at 798.

[37] 2 LEGAL PAPERS OF JOHN ADAMS 107 (L. Kinvin Wroth & Hiller B. Zobel eds., 1965) (emphasis added); *see also* CHARLES FRANCIS ADAMS, THE LIFE AND WORK OF JOHN ADAMS 276, 247-48 (Boston 1856), *quoted* in *Boyd*, 116 U.S. at 625; United States v. Parcel of Land, Bldgs., Appurtenances and Improvements, Known as 92 Buena Vista Ave., Rumson, N.J., 507 U.S. 111, 119 n.10 (1993) (plurality opinion); Stanford v. Texas, 379 U.S. 476, 481-82 (1965).

[38] SMITH, *supra* note 19, at 497.

century after we won the American Revolution, the United States Supreme Court, in *Boyd v. United States,* an important 1886 decision of the Court establishing constitutional limits on the government's seizure of a person's papers, looked back upon these historical developments and noted that

> [t]he practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book;" since they placed "the liberty of every man in the hands of every petty officer." This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. "Then and there," said John Adams, "then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." These things, and the events which took place in England immediately following the argument about writs of assistance in Boston, were fresh in the memories of those who achieved our independence and established our form of government.[39]

Much more recently, Justice Scalia made this point once again, more cogently and forthrightly, for the Supreme Court in 1989, acknowledging that "[t]he writs of assistance . . . were the principal grievance against which the Fourth Amendment was directed."[40]

Indeed, even before he was appointed to the Supreme Court, then New Hampshire Supreme Court Justice Souter had observed in 1990 for that state court that,

> [a]lthough litigation early in the reign of George III concentrated the opposition's scorn upon warrants to search for merely incriminating papers or other "mere evidence," the

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[39] *Boyd*, 116 U.S. at 625; *see also* Brower v. County of Inyo, 489 U.S. 593, 596 (1989).

[40] *Brower*, 489 U.S. at 596.

> characteristic American antagonism to the warrant practice of the day condemned the excessive generality of non-returnable authorizations to search any place for evidence of criminal wrongdoing, as exemplified by the writs of assistance issued to advance the enforcement of the revenue laws, and anathematized by Otis . . . .[41]

Similarly, Chief Justice Rehnquist made clear for the Supreme Court in 1990 that

> [t]he driving force behind the adoption of the [Fourth] Amendment, . . . was widespread hostility among the former Colonists to the issuance of writs of assistance empowering revenue officers to search suspected places for smuggled goods, and general search warrants permitting the search of private houses, often to uncover papers that might be used to convict persons of libel. The available historical data show, therefore, that the purpose of the Fourth Amendment was to protect the people of the United States against arbitrary action by their own Government . . . .[42]

The moral of this historical story is hardly obscure. The Fourth Amendment was drafted in large part in direct and reflexive response to the arbitrary and oppressive use of search and seizure powers by the English government in the American Colonies.

Indeed, one of the Constitution's draftsmen, Patrick Henry, another American patriot and hero, felt so strongly about the need for the new Constitution of the fledgling United States to specifically address this subject that he urged his colleagues in Virginia to reject the proposed new Constitution in the Virginia ratification proceedings, *inter alia*, on the ground of the absence of such explicit individual protections against the use of general warrants.[43] Henry argued that unless and until such express protection of individual rights against unreasonable

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[41] State v. Tucker, 575 A.2d 810, 812 (1990) (citations omitted).

[42] United States v. Verdugo-Urquidez, 494 U.S. 259, 266 (1990) (citations omitted).

[43] III THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 587 (Jonathan Elliott, ed., J.B. Lippincott Co. 1941) (1836).

searches and seizures was constitutionally codified, "any man may be seized, any property may be taken, in the most arbitrary manner, without any evidence or reason. Every thing the most sacred may be searched and ransacked by the strong hand of power."[44] Moreover, he added, "[w]e have infinitely more reason to dread general warrants here than they have in England . . . . [H]ere a man living many hundreds [of] miles from the judges may get in prison before he can get [a habeas corpus] writ."[45]

Virginia ratified the new Constitution of the United States despite the objections of Patrick Henry and the many others who shared his point of view.[46] But it did so, as did some other ratifying states, while simultaneously insisting upon the adoption of constitutional amendments which included detailed, express, and strict search-and-seizure provisions, provisions profoundly restricting the use of warrants.[47] The drafting of such a provision, now an essential part of our Bill of Rights, which includes the Fourth Amendment and its Warrant Clause, became, accordingly, the very first order of business of the First Congress of the new United States.[48]

So why have I belabored all of this constitutional history? You probably knew all or most of this stuff, even if you did not remember all of the names and all of the dates. You took, and most of you (hopefully) passed, seventh grade civics. You heard about the infamous "writs of assistance." You read about some of the acts of opposition to them and to the unfair trade laws they helped to enforce, events like the Boston Tea Party that took place in Boston Harbor on December 16, 1773. Or, if you did not remember any of these things specifically, at least you must remember however vaguely, being taught something about the reasons for the American Revolution.

But the reason to stress this history, the reason to pull you back to some of your dim and probably scary middle-school

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[44] *Id.* at 588.

[45] *Id.*

[46] DOUGLAS W. KNIEC, ET AL., INDIVIDUAL RIGHTS AND THE CONSTITUTION 29 (2d ed. 2004).

[47] *Id.*

[48] *Id.*

memories, is simply this: the significance of the foregoing events relating to the founding of our country also relate, *directly, forcefully, and importantly*, to the resolution of contemporary questions concerning the significance and application of Fourth Amendment search-and-seizure law.

We fought and we won a Revoluntionary War in large part because of our forefathers' and foremothers' experience with, and their anger about, the arbitrary and oppressive use of general warrants. More than two hundred thousand Americans fought in that War, and more than four thousand Americans died in it.[49] The resulting constitutional restrictions on unreasonable searches and seizures generally, and the use of warrants specifically, that are memorialized in our Fourth Amendment reflect therefore an important, indeed a critical and a compelling, part of our history as a nation. These restrictions continue to play a particularly important role in defining our national identity and character and in guiding our interpretation of the meaning of our constitutional democracy.

This point, the importance of the Fourth Amendment to our history and to our national identity and character, was, perhaps, most compellingly made by Justice Felix Frankfurter. In a 1950 dissenting opinion, objecting to the Supreme Court majority's approval of the warrantless search of a small-time criminal's office, files and papers, Justice Frankfurter eloquently observed that

> [t]he old saw that hard cases make bad law has its basis in experience. But petty cases are even more calculated to make bad law. The impact of a sordid little case is apt to obscure the implications of the generalization to which the case gives rise. Only thus can I account for [the majority's] disregard of the history embedded in the Fourth Amendment and the great place which belongs to that Amendment in the body of our liberties as recognized and applied by unanimous decisions over a long stretch of the Court's history.
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> It is a fair summary of history to say that the safeguards of liberty have frequently been forged in controversies involv-

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[49] U.S. Department of Veteran's Affairs, *America's Wars* (Oct. 2003), *available at* http://www1.va.gov/pressrel/amwars.pdf.

> ing not very nice people. And so, while we are concerned here with a shabby defrauder, we must deal with his case in the context of what are really the great themes expressed by the Fourth Amendment. A disregard of the historic materials underlying the Amendment does not answer them.
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> It is true . . . of journeys in the law that the place you reach depends on the direction you are taking. And so, where one comes out in a case depends on where one goes in. It makes all the difference in the world whether one approaches the Fourth Amendment as the Court approached it in [its prior decisions on the importance of Fourth Amendment protections] or one approaches it as a provision dealing with a formality. *It makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution, or one thinks of it as merely a requirement for a piece of paper.*[50]

The Fourth Amendment is important not only because it is the law, and not only because it is a part of our Bill of Rights, but it is also important because it is a vital part of our history, our self-identity, our democracy, and our national culture.

Put another way, a more cynical way, perhaps, Americans—American judges, in particular—must not ignore the important themes, liberties, and rights, both express and inherent, contained in our Fourth Amendment protections simply in order to assure the conviction of "bad guys." Even if we *know* (or assume that we know) that such accused persons are truly, unquestionably, and without the slightest doubt, genuinely "bad guys." Our Constitution, our Bill of Rights, our history, our democratic character, and our national culture are simply too important to us and to that which makes us proud to be

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[50] United States v. Rabinowitz, 339 U.S. 56, 68-69 (1950) (Frankfurter, J., dissenting) (emphasis added) (citations omitted); *see also* Groh v. Ramirez, 124 S. Ct. 1284, 1290 (2004) (quoting McDonald v. United States, 335 U.S. 451, 455 (1948)) ("We are not dealing with formalities."); United States v. Parcel of Land, Bldgs., Appurtenances and Improvements, Known as 92 Buena Vista Ave., Rumson, N.J., 507 U.S. 111, 118-19 n.10 (1993) (plurality opinion) ("[T]he misuse of the hated general warrant is often cited as an important cause of the American Revolution.").

Americans to permit us to ignore or, worse, to trivialize the important human rights themes contained in the Fourth Amendment.

Of course, this argument is not very controversial. It is an easy point to make, at least in the abstract. *Everybody*, surely every American at least—Democrat or Republican, Liberal or Conservative—is *for* human rights and liberties, *for* the Constitution, *for* the Bill of Rights, *for* Old Glory and all of the rest of the American icons and virtues that we freely espouse (especially to others) and hold so dear, particularly when it does not "cost us anything" to be *for* them.

But, what happens when there is a cost? And what happens when these costs are high? To answer this question, let us drag Osama bin Laden out of his cave and put him on center stage for a moment. Let us talk about Osama and about other leaders and followers of Al Qaeda, and let us talk about their friends, their supporters, their allies, and about all of the other assorted poseurs, wannabes, groupies, copycats, riff-raff, and hangers-on that surround or emulate them. To make this a complete picture, we also need to consider the group of individuals that our government suspects *might* be involved in one or more of these terrorism-related categories, but who are, in actual fact, not terrorists or associated with terrorists at all: the "false positives."

The important questions we need to ask and to answer, in the perilous times in which we now live, is this: Does and should and must the Fourth Amendment apply in the same fashion not just to run-of-the-mill criminals, but also to terrorists and suspected terrorists, individuals who are committing or who have committed, or who may be poised to commit, acts aimed at the destruction of extremely large numbers of people?

For many, if not most Americans, the answer to this question of the scope of the Fourth Amendment's putative applicability to terrorists, and to suspected terrorists, is absolutely clear and compelling. But, in my experience, there are two *entirely different*, although still absolutely-clear-and-compelling, answers to questions of this sort, both of which claim to be the *only* "true" answer, and each of which is, seemingly, the polar

opposite of the other. The two answers go something like this:

- *Answer #1*: Of course, the Fourth Amendment applies to everyone (at least to every American or to any individual searched or seized on American soil) if they are suspected of any sort of crime, trivial or horrific. Remember the words of Justice Frankfurter who said that "[i]t makes all the difference in the world whether one recognizes the central fact about the Fourth Amendment, namely, that it was a safeguard against recurrence of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution."[51] Enough said.

and

- *Answer #2*: Idealism is great, but dead people do not have the luxury of being idealistic. As Justice Jackson, a real advocate of Fourth Amendment values, nonetheless warned in a 1949 dissenting opinion, the Bill or Rights should not be converted into a "suicide pact."[52] We cannot allow terrorists to use our democratic strengths as weapons against us and harm or defeat us because of our own inability to act. Enough said.

In truth, there is nothing new in recognizing that these two competing points of view exist. As long ago as 1798, James Madison wrote in a letter to Thomas Jefferson that "[p]erhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad."[53] Thomas Jefferson, in contrast, himself authored a letter in 1810, in which he warned that "[t]o lose our country

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[51] *Rabinowitz*, 339 U.S. at 69 (Frankfurter, J., dissenting).

[52] Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting); *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) ("[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.").

[53] PHILLIP B. HEYMANN, TERRORISM, FREEDOM, AND SECURITY: WINNING WITHOUT WAR xi (2003) (quoting letter of James Madison to Thomas Jefferson (May 13, 1778)).

by a scrupulous adherence to written law would be to lose the law itself, with life, liberty, property and all those who are enjoying them with us; thus absurdly sacrificing the end to the means."[54] These are the same conflicting points of view that we see evidenced so widely today.

How do we deal with such dramatically different points of view? What does—*what should*—the Fourth Amendment and the rest of the Bill of Rights mean in perilous times? In *real* perilous times. In times when the threat to our nation, and to our national identity and national security, are concrete and imminent, not speculative or distant?

Ignoring for the moment the significant undertones of political partisanship that questions of this sort carry—for Democrats and Republicans, for Liberals and Conservatives—I suggest that *both* of these pat and reflexive answers that I have posed may be correct. At least I would like to argue that they are correct in significant, if perhaps somewhat less rhetorical, ways.

I believe strongly and firmly that the Fourth Amendment is more than just *a simple legal interdiction*; it is more than just a sensible rule to be followed whenever it is convenient and useful. Fourth Amendment protections and values are an important part of our national fabric, and, as Justice Oliver Wendell Holmes reminded us in 1920, we dare not tolerate treating the express Fourth Amendment strictures as a mere "form of words."[55]

Instead, I believe—I *strongly* believe—that the Fourth Amendment is critically important to our country in many important ways. The Supreme Court held in 1961, in its celebrated and seminal decision of *Mapp v. Ohio*, that if Fourth Amendment protections are not fully enforceable, then that constitutional provision is essentially

> valueless and undeserving of mention in a perpetual charter of inestimable human liberties, . . . [and it is] so ephemeral

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[54] *Id.* (quoting letter from Thomas Jefferson to John B. Colvin (Sept. 20, 1810)).

[55] Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

> and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in the concept of ordered liberty."[56]

I fully agree.

I believe, in short, that the Fourth Amendment *does*, and *must*, apply to everyone. *Everyone*. Whether they are terrorists or prom queens. Or even, you never know, if they are terrorist prom queens.

Moreover, it is absolutely clear that the Fourth Amendment was expressly *intended* to make it more difficult to fight crime. Fighting crime, terrorism or not, would certainly be easier, more convenient and more effective if no restraining rules at all existed on American law enforcement agents; if law enforcement agents today could once again use some form of "super writs of assistance," searching whoever, whenever and wherever they wanted; if they could seize whoever, whenever and wherever they wanted; and if they could interrogate and torture whoever for whatever length of time and in whatever way that they wanted.

But we have been down that road before and it is the wrong path. As Professor Philip Heymann of Harvard Law School has recently warned, "[e]ven what is effective in protecting the safety of American citizens and their property may be unwise because of its effects on the historic set of arrangements which have preserved our democratic liberties."[57] Frankly, I have done work for our government in countries where, regardless of those countries' supposed laws, all of what I just described was commonplace. Where torture was a standard and pervasive part of much law enforcement activity. Sadly, this kind of horrible inhumanity happens. But, of course, *our* laws, *our* Constitution, *our* history, *our* national character and identity, make that impossible. Impossible, lest we become something that we are not: another country with another culture and character, divorced from our history.[58]

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[56] Mapp v. Ohio, 367 U.S. 643, 655 (1961).

[57] HEYMANN, *supra* note 53, at 87.

[58] This Lecture was delivered before the episodes of torture at Abu Ghraib

With that said, and proudly and firmly said, I also believe, I *know*, that the Bill of Rights does not and was never intended to emasculate us. The Fourth Amendment was not intended, and it should not be interpreted, to make it impossible to protect ourselves from the very real and substantial threat that we face today from *real* terrorists and *real* terrorist groups, individuals and groups whose aim is sometimes genocidal and who appear bent upon our destruction as a culture and as a nation.

We can protect ourselves from cataclysmic threats of this sort. More important, we can do this and *still* maintain a fair and objective application of Fourth Amendment doctrine that respects our constitutional history. I really believe this. I do. And now I'll tell you why.

It is critically important, of course, not to sacrifice our constitutional heritage and constitutional structure to the perceived dangers of the moment. Just as the Constitution and the Fourth Amendment apply with full force to the small-time criminal (e.g., to the dope dealer, the burglar, and the car thief) they also apply with full force to the big-time criminal (e.g., to the murderer, the rapist, the kidnapper, and, yes, also to the terrorist). Once we start down the road of carving out categories of people or categories of crime to whom, or with respect to which, the full force of our Bill of Rights do not apply, we begin sliding down the notorious "slippery slope," headed toward the erosion of the rights of everyone, not just the "bad guys." This we cannot do. As Chief Justice Rehnquist warned in a recent book, it "is all too easy to slide from a case of genuine military necessity . . . to one where the threat is not critical and the power [sought to be exercised is] either dubious or nonexistent."[59]

Indeed, the Supreme Court recognized and responded in just this fashion to a similar slippery-slope problem when, in a

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Prison in Iraq came to light. *See, e.g.*, Josh White, *Ex-Guard to Face More Charges*, WASH. POST, June 9, 2004, at A16; Scott Higham, Joe Stephens & Josh White, *Dates on Prison Photos Show Two Phases of Abuse*, WASH. POST, June 1, 2004, at A1. If anything, what allegedly took place there, if true, only reinforces the points made herein.

[59] WILLIAM REHNQUIST, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME 224-25 (Vintage Books 2000) (1998).

1978 decision, it rejected the State of Arizona's attempt to create a "murder-scene exception" to the ordinary search-and-seizure rules dictated by the Fourth Amendment.[60] Forget warrants and probable cause and all of those onerous requirements, the State of Arizona argued, in essence, this was *murder*![61]

The Supreme Court made it clear, however, that the fact that a homicide had been committed, rather than some less heinous crime, made no difference to the appropriate Fourth Amendment analysis.[62]

> [T]he State points to the vital public interest in the prompt investigation of the extremely serious crime of murder. No one can doubt the importance of this goal. But the public interest in the investigation of other serious crimes is comparable. If the warrantless search of a homicide scene is reasonable, why not the warrantless search of the scene of a rape, a robbery, or a burglary? "No consideration relevant to the Fourth Amendment suggests any point of rational limitation" of such a doctrine.[63]

Similarly, no consideration relevant to the Fourth Amendment suggests any point of rational limitation of a doctrine that creates exceptions to normal Fourth Amendment doctrinal analysis as applied to, for example, an individual who seeks to plant a bomb in order to make a political point, in contrast with an individual who seeks to plant a bomb in order to accomplish some purely criminal and entirely non-political goal.

In the USA Patriot Act (the 2001 "edition"),[64] Congress enacted an extremely broad definition of "terrorism," including, for example, violent acts intended "to influence the policy of a government by intimidation or coercion . . . ."[65] Does this

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[60] Mincey v. Arizona, 437 U.S. 385, 392 (1978).

[61] *Mincey*, 437 U.S. at 392.

[62] *Id.* at 393.

[63] *Id.*

[64] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of 18 U.S.C.).

[65] § 802(a)(5)(ii), 115 Stat. at 760. Notably, related language prohibiting the provision of material support, including "expert advice or assistance" to designated

broad definition mean then that Eric Rudolph, for example, the accused Atlanta 2000 Summer Olympics bomber, is a "terrorist"?[66] Or is he "merely" a "criminal"? Even if the Fourth Amendment permitted such fine distinctions, does it make sense to be more respectful of his constitutional rights if he is deemed to be only a common thug, than if he intended to make an uncommon political statement, planting his bomb to make a point, however perverse and demented, through his violent activity aimed at changing our national policy on abortions?

More important, *can we* be more respectful of Eric Rudolph's constitutional rights in the former situation than in the latter as a matter of law and still contend that we are applying the Fourth Amendment objectively? Remember Justice Frankfurter's point that "[i]t is a fair summary of [our constitutional] history to say that the safeguards of liberty have frequently been forged in controversies involving not very nice people."[67]

Furthermore, we have learned, or one would have hoped that we have learned, the terrible lessons of *Korematsu v. United States*,[68] when scores of people living in the United States, many of them Japanese-American citizens, were interned, "seized" in Fourth Amendment parlance.[69] This occurred, of course, at the beginning of World War II, out of stereotypic but unproven fears of the possible complicity of these individuals with a hostile power with which we were then at war. Such an

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terrorist organizations was held unconstitutional by a federal court as void for vagueness. Humanitarian Law Project v. Ashcroft, 309 F. Supp. 2d 1185, 1200 (C.D. Cal. 2004).

[66] *See, e.g.*, Patrick Jonsson, *How Did Eric Rudolph Survive?*, THE CHRISTIAN SCIENCE MONITOR, June 4, 2003, § USA, at 1; Daniel Levitas, *Our Enemies At Home*, N.Y. TIMES, Dec. 13, 2003, at A19; Michael A. Fletcher, *At Home, Rudolph Wins Sympathy; Distrust of Government Widespread in Area*, WASH. POST., June 4, 2003, at A2; Edward Walsh, *Ashcroft Weighs Where to Try Rudolph First: Atlanta, Birmingham Both Saw Deaths in Bombings*, WASH. POST, June 2, 2003, at A3.

[67] United States v. Rabinowitz, 339 U.S. 56, 68-69 (1950) (Frankfurter, J., dissenting).

[68] 323 U.S. 214 (1944).

[69] *Korematsu*, 323 U.S. at 217; *see* Hirabayashi v. United States, 320 U.S. 81 (1943); *see also* Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (O'Connor, J., plurality opinion) (discussing *Korematsu* and its legacy).

extraordinary response, essentially suspending or ignoring the Fourth Amendment and other constitutional protections in perilous times, even in times of legitimate and serious threats to our national security, was not only *not* productive, it was instead *destructive* of our constitutional fabric, and of our self-congratulatory claims, trumpeted throughout the world, that we are a nation of democratic virtues governed by the fair and even-handed application of the rule of law.

As Justice Thurgood Marshall made the point,

> [h]istory teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation-camp cases and the Red scare and McCarthy-era internal subversion cases[70] are only the most extreme reminders that when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.[71]

Moreover, it is arguably even more difficult to hold the constitutional balance true when the most serious costs of our government's response to the fear and the actual specter of

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[70] *See, e.g.,* Schenck v. United States, 249 U.S. 47 (1919); Dennis v. United States, 341 U.S. 494 (1951).

[71] Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) (citations omitted); *see also Hamdi*, 124 S. Ct. at 2635 (O'Connor, J., plurality opinion). Justice O'Connor made a similar point in *Hamdi*, stating:

> [A]s critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat.

Hamdi, 124 S. Ct. at 2635 (O'Connor, J., plurality opinion); *see also* Rumsfeld v. Padilla, 124 S. Ct. 2711, 2735 (2004) (Stevens, J., dissenting) ("Unconstrained Executive detention for the purpose of investigating and preventing subversive activity is the hallmark of the Star Chamber."); *Ex parte* Milligan, 71 U.S. 2, 125 (1866). This idea was recognized as early as 1860, when Justice Davis explained that

> [the Founders] knew—the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell; and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen.

Ex parte Milligan, 71 U.S. at 125.

terrorism—costs like seizures and detentions on less than probable cause; prolonged, intensive and humiliating interrogations; and, unfortunately, physical degradation, including torture—are costs that generally *other* people, not ourselves, must bear. As the noted scholar and political commentator, Ronald Dworkin, has reminded us,

> [m]any Americans believe that . . . the attacks on September 11 require (as it is often put) "a new balance between liberty and security." That much-used expression suggests that we can properly judge the new policies by asking whether they are in our overall interest, as we might decide, for instance, whether to strike a new balance between road safety and the convenience of driving fast by lowering speed limits. But, with hardly any exceptions, no American who is not a Muslim and has no Muslim connections actually runs any risk of being labeled an enemy combatant and locked up in a military jail. The only balance in question is the balance between the majority's security and *other people's* rights, and we must think about that as a matter of moral principle, not of our own self-interest.
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> . . . .
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> . . . [The] strategy of putting American safety *absolutely* first, a strategy that recommends any measure that improves American security against terrorism even marginally or speculatively, or that improves the cost-efficiency or convenience of America's anti-terrorism campaign, without counting the harm or unfairness of that measure to its victims [is the] strategy [we followed] in interning Japanese-Americans—the benefit to security of that wholesale detention was minimal and the damage it inflicted on its victims was enormous—and we look back on that episode with great national embarrassment. Of course every government has a special responsibility to look after its own citizens' safety, and a nation may, when necessary, use violence in self-defense. But the harm it deliberately inflicts on others must be comparable to the harm it thereby prevents to its own people, and when our government shows itself ready to impose grave harm on foreigners or on suspected Americans for only speculative, marginal, or remote benefits to the rest of us, its action presupposes that their

lives count for nothing compared to ours.[72]

The question nonetheless recurs with a more modern twist. Is the situation we face today somehow *qualitatively different* from the perils faced by Americans in the past? Given concerns of the stature and significance of the current genocidal threats of terrorism, what weight, *if any*, does, or should, the seriousness of the crimes under investigation or the crimes feared to be imminent, play in Fourth Amendment analysis?

In three very recent decisions, all three handed down in the space of only a few weeks in the October 2003 Term, the Supreme Court has begun to signal its answer to this question. It is an answer, I think, that recognizes and accepts *both* of the competing views I earlier described (i.e., that the Fourth Amendment applies to everyone *and* that terrorism is different). And it is an answer, I also think, that sets the contours of the way in which the Supreme Court will, and lower courts must as well, deal with the terrorism-related Fourth Amendment cases that will eventually reach their dockets. To explain the significance of these three recent decisions, let me begin with a decision handed down three years ago.

In a 2001 decision, *Atwater v. City of Lago Vista*,[73] a narrow five-to-four majority of the Supreme Court, in an opinion authored by Justice Souter, ruled that the Fourth Amendment's probable-cause requirement applies in precisely *the same way* to *all* criminal offenses, whether they are major or minor, grave or trivial.[74] In fact, the *Atwater* Court specifi-

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[72] Ronald Dworkin, *Terror & the Attack on Civil Liberties*, 50 N.Y. REV. OF BOOKS, Nov. 6, 2003, at 37, 38 (emphasis added); *see also* HEYMANN, *supra* note 53, at 113 ("What we must do is assure than no one assumes the American people would willingly buy a small amount of increased safety in exchange for the torture, detention, or imprisonment of innocents abroad.").

> As long as others believe that the American people would willingly buy a small amount of increased safety in exchange for the torture, detention, or imprisonment of many innocents abroad, we cannot sustain any claim to moral leadership. And moral leadership has served us well for decades by eliciting popular support in nations around the world–i.e., in terms of freely given support for the policies of the United States.

HEYMAN, *supra* note 53, at 126-27.

[73] 532 U.S. 318 (2001).

[74] *Atwater*, 532 U.S. at 318.

cally declined to craft any special Fourth Amendment rule for a minor offender like the defendant in that particular case.[75] That defendant, Gail Atwater, who, in the extensive media accounts of the case, was commonly referred to as a "soccer Mom" (and who may well have been a prom queen in her time), was arrested and then dragged off to jail because she and her two small children were observed by a police officer (who allegedly held a grudge against her) while she and her children were driving in her pick-up truck without wearing their seat belts.[76]

Not wearing a seatbelt is obviously not the same kind of offense as hijacking an airplane or planting a bomb. But it is nonetheless a crime in Texas, although a minor crime, punishable by only a small fine. Because it is a crime, minor or not, the bare five-justice majority of the Court in *Atwater* sternly admonished that

> the standard of probable cause "applie[s] to *all* arrests, without the need to 'balance' the interests and circumstances involved in particular situations." . . . If an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.[77]

In short, although she may have been just a no-seat-belt-wearing soccer Mom, at least in Texas, Gail Atwater was still a criminal. And criminals, *all* criminals, minor or not, can be arrested, and *all* criminals may be carted away to jail. To be fair, the *Atwater* majority thought that she *should not* have been taken to jail, but, nonetheless, it held that the State of Texas, in its wisdom, *could* lawfully do this under the Fourth Amendment.[78]

Notably, however, Justice O'Connor, dissented in *Atwater*.[79] Standing up for all of the criminal soccer Moms in

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[75] *Id.* at 323.

[76] *Id.*

[77] *Id.* at 354 (emphasis added) (quoting Dunaway v. New York, 442 U.S. 200, 208 (1979)).

[78] *Id.*

[79] *Id.* at 360 (O'Connor, J., dissenting).

America, undoubtedly a sizeable group, Justice O'Connor argued, along with the three other justices in dissent, that Gail Atwater's violation of a minor, "fine-only offense" like the Texas seat-belt law, indeed justified her *arrest*, but it did *not* justify a *full-custody* arrest.[80] In other words, four justices took issue with the *Atwater* majority's vision of an inflexible Fourth Amendment, a Fourth Amendment that permits the government to make a full *custodial* arrest in any and all instances in which *any* criminal law, however trivial, was broken.

Justice O'Connor reasoned as follows:

> The majority insists that a bright-line rule focused on probable cause is necessary to vindicate the State's interest in easily administrable law enforcement rules. Probable cause itself, however, is not a model of precision. "The quantum of information which constitutes probable cause—evidence which would 'warrant a man of reasonable caution in the belief' that a [crime] has been committed—must be measured by the facts of the particular case." The rule I propose—which merely requires a legitimate reason for the decision to escalate the seizure into a full custodial arrest—thus does not undermine an otherwise "clear and simple" rule.
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> While clarity is certainly a value worthy of consideration in our Fourth Amendment jurisprudence, it by no means trumps the values of liberty and privacy at the heart of the Amendment's protections.[81]

Of course, this language was written in dissent. It did not carry the day. *But* Justice O'Connor's point (i.e., that Fourth Amendment probable-cause analysis is not clear and simple, and that it does not, and should not, apply in precisely the same fashion in every case, major or minor), would appear to have been vindicated—albeit *de facto*, not *de jure*—in the unanimous decision of *Maryland v. Pringle*,[82] handed down on December 15, 2003.

The *Pringle* decision involved the following facts. At 3:16

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[80] *Id.* at 365-66 (O'Connor, J., dissenting).

[81] *Id.* at 366 (O'Connor, J., dissenting) (quoting Wong Sun v. United States, 371 U.S. 471, 479 (1963) (citation omitted)).

[82] 124 S. Ct. 795 (2003).

a.m. on August 7, 1999, a Baltimore County Police officer stopped a Nissan Maxima for speeding and because the driver, just like Gail Atwater, was not wearing a seat belt.[83] There were three occupants in the car: the driver (who owned the car); Joseph Pringle, who was a front-seat passenger; and a third person, who was a back-seat passenger.[84] The officer asked the driver for his license and his vehicle registration.[85] When the driver responded by opening and reaching into the glove compartment to retrieve his registration, the officer kept his eye on him and observed a large amount of rolled-up cash stuffed into the glove compartment.[86]

The officer then returned to his patrol car with the license and registration to check the police computer system for outstanding violations.[87] The computer check revealed that nothing was wrong and, as a result, the officer returned to the stopped car, had the driver get out of it, and simply issued him an oral warning.[88]

Now the plot thickens. While all of this was going on, a second patrol car arrived, and the newly-arrived police officer asked the driver if he had any weapons or narcotics in his car.[89] The driver said that he did not, and, rather stupidly, as it turned out, consented to a search of his vehicle.[90] The search turned up $763, which was the rolled-up cash that had been viewed earlier in the glove compartment.[91] More important, it also turned up five plastic baggies containing cocaine, which were concealed behind the back-seat armrest.[92] When the second officer began his search, the armrest was in the upright position, flat against the rear seat.[93] The officer pulled it down and—*voila!*—found the cocaine, which had been stuffed

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[83] *Pringle*, 124 S. Ct. at 798.
[84] *Id.* at 798.
[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *Id.* at 798.
[90] *Id.*
[91] *Id.*
[92] *Id.*
[93] *Id.*

between the armrest and the back seat of the car.[94]

The officer then questioned all three men about the ownership of the drugs and money, and he told them that if no one admitted to owning the drugs, he was simply going to arrest them all.[95] Unsurprisingly, none of the men had the foggiest idea where the drugs or money could possibly have come from.[96] All three men in *Pringle* were "shocked, *simply shocked*," to discover that there were drugs in the car. *Right.* Nonetheless, their protestations of innocence unavailing, all three men were immediately placed under arrest and taken to the station house.[97]

Later that morning, however, Pringle, the front-seat passenger, changed his story.[98] Waiving his *Miranda* rights, he confessed.[99] Pringle admitted that the cocaine belonged to him, that he and his friends were going to a party with it, and that he intended to either sell the cocaine there or Pringle, obviously a real charmer, planned to "[u]se it [in exchange] for sex."[100] Pringle also maintained that both the driver and the other passenger in the car had absolutely no knowledge of these drugs, and, ultimately, in the absence of any additional evidence, both of these other individuals were in fact released by the police.[101]

Prior to trial, Pringle tried, unsurprisingly but unsuccessfully, to suppress his confession, arguing that it was the fruit of an illegal arrest since the officers did not have probable cause to arrest him and to take him into custody, where he subsequently confessed.[102] The trial court rejected this argument, ruling that the officers *did in fact* possess sufficient probable cause to arrest Pringle.[103] Thereafter, he went to trial and a jury convicted him of possession with one count of intent to dis-

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[94] *Id.*
[95] *Id.*
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.* at 799.
[103] *Id.*

tribute cocaine and one count of possession of cocaine.[104] He was subsequently sentenced to ten years in prison without any possibility of parole.[105] The Court of Special Appeals of Maryland affirmed his conviction.[106]

The seven-judge Maryland Court of Appeals, however, by a narrow four-to-three margin, reversed the Court of Special Appeals.[107] The Court of Appeals concluded that, absent specific facts tending to show Pringle's knowledge and dominion or control over the drugs, "the mere finding of cocaine in the back armrest when [Pringle] was a front seat passenger in a car being driven by its owner [was] insufficient to establish probable cause for an arrest for possession."[108]

As to the wads of money seen by one police officer and then found by the other officer stuffed into the glove compartment, the Maryland Court of Appeals ruled that although

> [t]he State points to the additional fact that the police officer saw a large amount of rolled up money in the glove compartment located in front of [Pringle, the presence of m]oney, without more, is innocuous . . . . There are insufficient facts that would lead a reasonable person to believe that [Pringle], at the time of his arrest, had prior knowledge of the money or had exercised any dominion or control over it. [A] police officer's discovery of money in a closed glove compartment and cocaine concealed behind the rear armrest of a car is insufficient to establish probable cause for an arrest of a front seat passenger, who is not the owner or person in control of the vehicle, for possession of the cocaine.[109]

As a result of this ruling, Pringle's drug convictions were reversed. But, not for long.[110] The United States Supreme Court granted certiorari and, in December of 2003, it reversed

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[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*
[108] Pringle v. State, 805 A.2d 1016, 1027 (Md. Ct. App. 2002), *rev'd*, 124 S. Ct. 795 (2003).
[109] *Pringle*, 805 A.2d at 1028.
[110] *Id.* at 1033.

the decision of the Maryland Court of Appeals.[111] Chief Justice Rehnquist, writing for the Court, observed that "[i]t is uncontested in the present case that the officer, upon recovering the five plastic glassine baggies containing suspected cocaine, had probable cause to believe a felony had been committed. The sole question [remaining] is whether the officer had probable cause to believe that Pringle committed that crime."[112]

In answering this question, the Chief Justice, who had joined the five-justice majority in the *Atwater* decision, upholding Gail Atwater's custodial arrest for a minor, seat belt offense in large part because of the supposed *inflexibility* of Fourth Amendment probable cause, described in *Pringle* a rather more malleable probable-cause analysis, concluding as follows:

> The long-prevailing standard of probable cause protects "citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime," while giving "fair leeway for enforcing the law in the community's protection" On many occasions, we have reiterated that the probable-cause standard is a "'practical, nontechnical conception'" that deals with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'" "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules."
>
> The probable-cause standard is incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances.[113]

Applying this "fluid" and open-ended conception of probable cause, the Chief Justice then concluded for a unanimous Court:

> In this case, Pringle was one of three men riding in a Nissan Maxima at 3:16 a.m. There was $763 of rolled-up cash

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[111] *Pringle*, 124 S. Ct. at 802.

[112] *Id.* at 799 (citation omitted).

[113] *Id.* at 799-800 (quoting Brinegar v. United States, 338 U.S. 160, 175-76 (1949); Illinois v. Gates, 462 U.S. 213, 231-32 (1983)).

> in the glove compartment directly in front of Pringle. Five plastic glassine baggies of cocaine were behind the back-seat armrest and accessible to all three men. Upon questioning, the three men failed to offer any information with respect to the ownership of the cocaine or the money.
>
> We think it an entirely reasonable inference from these facts that *any or all three of the occupants* had knowledge of, and exercised dominion and control over, the cocaine. Thus a reasonable officer could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly.[114]

Additionally, Chief Justice Rehnquist added that

> [t]he Court of Appeals of Maryland dismissed the $763 seized from the glove compartment as a factor in the probable-cause determination, stating that "[m]oney, without more, is innocuous." The court's consideration of the money in isolation, rather than as a factor in the totality of the circumstances, is mistaken in light of our precedents. . . . We think it is abundantly clear from the facts that this case involves more than money alone.[115]

Now recall for one moment Justice O'Connor's observation, on behalf of the four dissenters in *Atwater*, that "[p]robable cause . . . is not a model of precision. 'The quantum of information which constitutes probable cause evidence which would "warrant a man of reasonable caution in the belief" that a [crime] has been committed—must be measured by the facts of the particular case.'"[116] Compare the Chief Justice's observation for a unanimous Court in *Pringle*, handed down only two years later, that "'probable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules.'"[117]

It would appear that, whatever the continuing validity of

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[114] *Id.* at 800-01 (emphasis added).

[115] *Id.* at 800 n.2 (citations omitted).

[116] *Atwater*, 532 U.S. at 366; *see supra* note 81 and accompanying text.

[117] *Pringle*, 124 S. Ct. at 799-800 (quoting Illinois v. Gates, 462 U.S. 213, 272 (1983)); *see supra* note 113 and accompanying text.

the *Atwater* majority's analysis, which treated the Fourth Amendment's probable-cause standard (for post-arrest custody purposes) as static and unchanging whatever the facts and circumstances in question, it is clear *today* that the Supreme Court views probable cause through a somewhat more pragmatic and flexible lens, in the Court's words, as a "'"practical, nontechnical conception"' that deals with "'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"'"[118]

It is possible, of course, to distinguish *Atwater* from *Pringle* by noting that the Court is unwilling to compromise the State's authority to detain and/or search apparent small-time criminals (while noting at the same time the imprudence of engaging in such a course of action in cases like that of Gail Atwater's), but the Court *is* willing to compromise the quantum of certainty required before Fourth Amendment activity is undertaken in cases where the apparent criminal conduct is more serious, like, for example, Joe Pringle's trafficking in cocaine.

But, in my view, I think Justice O'Connor simply "got it right" in *Atwater* and that the *Pringle* decision demonstrates why. A more significant showing beyond mere "probable-cause-that-a-crime-*any-crime*-has-been-committed" should be required under the Fourth Amendment before we permit the State to blithely toss all the seat belt criminals and their soccer-Momish ilk,—the evil litterers, for example, and their posses; the nefarious smokers huddled inside buildings criminally puffing away in restricted areas, and their tobaccan enablers; the wicked jaywalkers and their misdemeanant henchmen—more should be required than simply determining that there has been a violation of the law before we just let the State blithely toss them into jail, assuming, as in *Atwater*, that the criminalizing state has made clear the trivial nature of the offense by declining to permit it to be punished by any term of incarceration.

In short, more should be required before the police are entitled to make full custodial arrests. Bear in mind that, as an incident of such custody, police possess the concomitant right to

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[118] *Pringle*, 124 S. Ct. at 799-800 (quoting *Gates*, 462 U.S. at 231).

use such intrusive investigative tools as prolonged detention and/or strip and body cavity searches. A humiliating and seemingly punitive body cavity search of Gail Atwater would have been very unlikely to have turned up a weapon, to put it mildly, or any evidence relevant to her criminal seat-beltless proclivities. There was not, after all, any question of whether or where the seat belt had been hidden.[119]

But, although I think he got it wrong in *Atwater*, where he

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[119] There is another reason why such an intrusive search should not be permitted under the Fourth Amendment in minor cases like *Atwater* where there is no reasonable belief that additional physical evidence may exist. At this time, the reason does not command a majority of the Supreme Court, but it may well be accepted by a majority of the Court in the near future.

In a decision subsequently handed down in the 2003 Term, Thornton v. United States, 124 S. Ct. 2127 (2004), a majority of the Supreme Court held that the rule established in New York v. Belton, 453 U.S. 454 (1981), permitting a search of the "passenger compartment" of a vehicle incident to the lawful custodial arrest of an occupant, applies even when the searching officer does not begin to search until the person arrested has already left the vehicle. *Thornton*, 124 S. Ct. at 2137. Justices Stevens and Souter dissented. *Id.* at 2138 (Stevens, J., dissenting).

Significantly, however, Justice Scalia, joined by Justice Ginsburg, concurred only in the judgment of the Court, taking the position that the *Belton* rule should be "limit[ed] to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 2136 (Scalia, J., concurring). A plurality of the Court—but only a plurality—disagreed with the Scalia position. *Id.* at 2132 n.4. Justice O'Connor, who was the fifth vote for the majority result, concurred in every part of the majority opinion *except* the portion rejecting Scalia's position, adding that:

> I write separately to express my dissatisfaction with the state of the law in this area. As Justice Scalia forcefully argues, . . . lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception . . . . That erosion is a direct consequence of *Belton's* shaky foundation. While the approach Justice Scalia proposes appears to be built on firmer ground, I am reluctant to adopt it in the context of a case in which neither the Government nor the petitioner has had a chance to speak to its merit.

Id. at 2133 (O'Connor, J., concurring).

The upshot of these competing points of view is that there is some significant chance, if not a likelihood, that in a future case, the *Belton* rule will be limited "to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 2136 (Scalia, J., concurring). If such a new rule applied to the hypothesized extension of the *Atwater* facts discussed in the text above, a body-cavity search (and probably a strip search) would surely be held to be unconstitutional.

joined the majority, I think that Chief Justice Rehnquist got it right in *Pringle* when he concluded for a unanimous Court that the quantum of suspicion necessary to effect a Fourth Amendment encounter needs to reflect the necessity for "protect[ing] 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while [providing law enforcement, pragmatically,] with 'fair leeway for enforcing the law in the community's protection.'"[120]

Indeed, there is nothing either new or shocking about the *Pringle* Court's recognition that the constitutional prerequisite of probable cause prior to making an arrest (a "seizure" under the Fourth Amendment) does not and should not require law enforcement officers to possess proof of the ultimate facts in question by a preponderance of the available evidence. The classic example demonstrating this point of criminal procedure is, oddly enough, often taken from the first Restatement of Torts published in 1934, and it goes as follows:

> A sees B and C bending over a dead man D. B and C each accuse the other of murdering D. A is not sure that either B or C did the killing, but he has a reasonable suspicion that *either* B or C killed D. A is privileged to arrest either or both.[121]

In other words, despite the fact that A cannot prove by a preponderance of evidence that either B or C killed D at this point in time, i.e., there is no proof of ultimate facts greater than fifty percent, A is nonetheless still privileged to arrest either, or both of them.

The *Pringle* Court cited this example and, similarly, held that probable cause to arrest existed in *Pringle* because there was significant and compelling evidence that *all three occupants* of the car were engaged in some sort of concerted activity, even though that fact could not be established, at that point in time, by a preponderance of the evidence, let alone by the

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[120] *Pringle*, 124 S. Ct. at 799; *see supra* note 113 and accompanying text.

[121] RESTATEMENT (SECOND) OF TORTS § 119, cmt. j, illus. 2, at 198 (1965) (emphasis added); *see also* RESTATEMENT (FIRST) OF TORTS § 119, cmt. j, illus. 2, at 254 (1934) (invoking the same example).

beyond-a-reasonable-doubt standard needed to convict them at trial.[122] The three individuals' presence together in the car late at night, the wads of money stashed in the glove compartment, and the presence of the cocaine packaged individually, as if for resale and distribution, stashed covertly behind the armrest gave the arresting officers sufficient grounds to reasonably believe that Pringle and the other two occupants of the car were engaged in, at the very least, the joint possession of narcotics, if not in some sort of more serious ongoing drug sales enterprise.[123] The fact that none of the three could or would offer an innocent explanation for his presence in the car did not exonerate them all, but instead simply added to the suspicious atmosphere.[124] *Someone* must have known how the cocaine got there!

Moreover, the seriousness of the crime at issue, possible drug trafficking, was clearly relevant to the *Pringle* Court's Fourth Amendment probable-cause analysis.[125] If, for example, the facts in *Pringle* had involved three individuals observed in a no-smoking area, each standing next to a single burning cigarette butt lying on the ground (signaling that someone had clearly been smoking) but each of the three individuals, as in *Pringle*, could not fathom how that criminal evidence got there ("I'm 'shocked' to find smoking here!"), it would appear to me that, recognizing the necessity for "protect[ing] 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection,'"[126] there would have been *insufficient* justification for making an arrest or a search of any or all of these individuals, despite the *Atwater* majority's professed (but now dated) disinclination to distinguish major from minor crimes.

But, this conclusion should and would change once again I believe, when the smoking object on the floor is not a cigarette

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[122] *Pringle*, 124 S. Ct. at 800-01.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] *Pringle*, 124 S. Ct. at 799; *see supra* note 113 and accompanying text.

but transmuted instead into a smoking gun lying next to a dead body, with three individuals standing around, professing no knowledge whatever of what has occurred. In that case, it appears to me—and I am certain that the Supreme Court would agree, more certain than ever after *Pringle*, that there is more than sufficient lawful and constitutional justification for arresting any or all of these three individuals.

And the fact that I have argued that there was *insufficient* evidence of probable cause in the smoking cigarette hypothetical does not mean, I would contend further, that the Fourth Amendment has been applied in an inconsistent fashion when probable cause is deemed to exist with respect to a more serious crime. The Fourth Amendment has simply been applied, in the Supreme Court's phrasing, "practically," "nontechnically," and in a manner "that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"[127]

Let me add to this analysis a second recent Supreme Court decision, even newer than *Pringle*, to reinforce this point. Let me tell you about *Illinois v. Lidster*,[128] handed down by the Supreme Court on January 13, 2004.

The essential facts of *Lidster* are as follows. On Saturday, August 23, 1997, just after midnight, an unknown motorist traveling eastbound on a highway in Lombard, Illinois, struck and killed a seventy-year-old bicyclist.[129] The motorist then simply drove off into the night without identifying himself.[130] About one week later, at just about the same time of night and at just about the same place on the highway, local police set up a checkpoint designed to obtain more information about the accident from the motoring public.[131]

A number of marked police vehicles, lights flashing, partially blocked the eastbound lanes of the highway.[132] The blockage forced traffic to slow down, leading to lines of up to

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[127] *Pringle*, 124 S. Ct. at 799; *see supra* note 113 and accompanying text.
[128] 124 S. Ct. 885 (2004).
[129] *Lidster*, 124 S. Ct. at 888.
[130] *Id.*
[131] *Id.*
[132] *Id.*

fifteen cars in each lane.[133] As each vehicle drew up to the checkpoint, an officer would stop it for ten to fifteen seconds, ask the occupants whether they had seen anything happen there the previous weekend, and hand each driver a flyer.[134] The flyer said "ALERT . . . FATAL HIT & RUN ACCIDENT" and requested "assistance in identifying the vehicle and driver in this accident which killed a 70 year old bicyclist."[135] The officer distributing the flyers did not ask for the driver's name, license, or insurance information, nor did he or she ticket anyone for plain-view infractions like seatbelt violations.

Robert Lidster drove his minivan toward the checkpoint.[136] But, just as he approached the checkpoint, he swerved suddenly, narrowly missing one of the officers who was manning the checkpoint.[137] After jumping out of the way, that officer approached the minivan to ask, reasonably enough, why the driver had almost hit him.[138] When Lidster answered, the officer smelled alcohol on his breath and noticed that his speech was slurred.[139] He then directed Lidster to a side street where another officer administered a sobriety test.[140] When he failed the test, Lidster was arrested, and he was subsequently tried and convicted in Illinois state court of driving under the influence of alcohol.[141]

Lidster challenged the lawfulness of his arrest and conviction, *inter alia*, on the ground that the government had obtained much or all of its relevant evidence of DUI as the fruits of the use of a checkpoint stop that violated the Fourth Amendment.[142] The trial court rejected this challenge.[143] But the intermediate Illinois appellate court reached the opposite conclusion,[144] reversing Lidster's conviction, and the Illinois

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[133] *Id.*
[134] *Id.*
[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*; *see* Illinois v. Lidster, 747 N.E.2d 419 (Ill. Ct. App. 2001), *aff'd*, 779

Supreme Court agreed with the appellate court.[145]

The Illinois Supreme Court held, by another one of those narrow four-to-three votes that seem to flourish in this area of the law, that the United States Supreme Court's 2000 decision in the case of *Indianapolis v. Edmond*,[146] required the Illinois court to find that Lidster's stop at a police checkpoint, made without any individualized suspicion at all on the part of the officers manning the checkpoint, was unconstitutional.[147]

In *Edmond*, the Supreme Court had indeed previously found another checkpoint unconstitutional, one at which the Indianapolis police had stopped vehicles simply to look for evidence of any possible drug crimes that might have been committed by the occupants of those stopped vehicles.[148] After stopping a vehicle at the checkpoint, police would examine (from outside the vehicle) the vehicle's interior, walk a drug-sniffing dog around the exterior, and, if they found sufficient evidence of drug (or other) crimes, they would arrest the vehicle's occupants.[149] The Supreme Court found that police had set up this checkpoint primarily for *general* "crime control" purposes, i.e., "to detect evidence of ordinary criminal wrongdoing."[150] Accordingly, the *Edmond* Court held, since these checkpoint stops were made entirely without any individualized suspicion of criminal conduct (just as in *Lidster*), the checkpoints were unconstitutional.[151] The Fourth Amendment, the *Edmond* Court added, forbids such suspicionless stops, in the absence of "special circumstances."[152]

But, despite *Edmond*, the Supreme Court in *Lidster* reversed the reversal of Robert Lidster's conviction by the Illinois Supreme Court.[153] Justice Stephen Breyer, writing for a ma-

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N.E.2d 55 (Ill. 2002), *rev'd*, 124 S. Ct. 885 (2004).

[145] *Lidster*, 124 S. Ct. at 888.

[146] 531 U.S. 32 (2000).

[147] *Lidster*, 124 S. Ct. at 888; *see* People v. Lidster, 779 N.E.2d 855 (Ill. 2002), *rev'd*, 124 S. Ct. 885 (2004).

[148] *Edmond*, 531 U.S. at 35.

[149] *Id.*

[150] *Id.* at 41.

[151] *Id.* at 44.

[152] *Id.*

[153] *Lidster*, 124 S. Ct. at 891.

jority of the Court, reasoned that

> [t]he checkpoint stop here differs significantly from that in *Edmond*. The [*Lidster*] stop's primary law enforcement purpose was *not* to determine whether a vehicle's occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others. The police expected the information elicited to help them apprehend, not the vehicle's occupants, but other individuals.
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> . . . .
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> . . . [U]nlike *Edmond*, the context here (seeking information from the public) is one in which, by definition, the concept of individualized suspicion has little role to play. Like certain other forms of police activity, say, crowd control or public safety, an information-seeking stop is not the kind of event that involves suspicion, or lack of suspicion, of the relevant individual.
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> For another thing, information-seeking highway stops are less likely to provoke anxiety or to prove intrusive. The stops are likely brief. The police are not likely to ask questions designed to elicit self-incriminating information. And citizens will often react positively when police simply ask for their help as "responsible citizen[s]" to "give whatever information they may have to aid in law enforcement."[154]

As a result of this analysis, the *Lidster* Court reasoned that while a suspicionless checkpoint stop is not usually constitutional, as the *Edmond* Court established only four years previously, a suspicionless *informational* checkpoint stop *could be* found to be reasonable under the Fourth Amendment, albeit in the appropriate circumstances.[155] In this case, the Court continued, the informational checkpoint stop *was in fact* reasonable and, hence, it *was* constitutional.[156] In Justice Breyer's words,

> *[t]he relevant public concern was grave.* Police were in-

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[154] *Lidster*, 124 S. Ct. at 889 (quoting Miranda v. Arizona, 384 U.S. 436, 477-78 (1966)).

[155] *Id.* at 888-89.

[156] *Id.*

> vestigating a crime that had resulted in a human death. No one denies the police's need to obtain more information at that time. And the stop's objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort.
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> The stop advanced this grave public concern to a significant degree. The police appropriately tailored their checkpoint stops to fit important criminal investigatory needs. The stops took place about one week after the hit-and-run accident, on the same highway near the location of the accident, and at about the same time of night. And police used the stops to obtain information from drivers, some of whom might well have been in the vicinity of the crime at the time it occurred.
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> Most importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect. Viewed objectively, each stop required only a brief wait in line—a very few minutes at most. Contact with the police lasted only a few seconds. . . . Viewed subjectively, the contact provided little reason for anxiety or alarm. The police stopped all vehicles systematically. And there is no allegation here that the police acted in a discriminatory or otherwise unlawful manner while questioning motorists during stops.[157]

Note just *how* the *Lidster* majority applied the Fourth Amendment. The Fourth Amendment applies to checkpoints, *all* checkpoints, as they are *all* "seizures." *But*, the touchstone of the Fourth Amendment is reasonableness. And it was, the Court concluded, wholly and entirely reasonable for the police to use this sort of individualized-suspicion*less*, investigative-checkpoint technique as a matter of Fourth Amendment law since: the public concern was "grave"; the information sought related to a "specific and known crime, not . . . unknown crimes of a general sort"; the police appropriately tailored their Fourth Amendment activity to fit this important criminal investigatory need; the activity interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect; and there was neither evidence nor even an allegation that the police had acted in a discriminatory or otherwise unlawful fashion.[158]

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[157] *Id.* at 891 (citations omitted) (emphasis added).
[158] *Id.*

As in *Pringle*, the seriousness of the crime at issue, *inter alia*, was clearly relevant to the *Lidster* Court's Fourth Amendment analysis. It was a significant component of the reasonableness inquiry. Moreover, *Pringle* and *Lidster* are not the only recent Supreme Court decisions that make it clear that the application of the Fourth Amendment depends closely upon the particular context in which the relevant law enforcement activities arise.

In one last and also very recent decision, in *United States v. Banks*,[159] handed down on December 2, 2003, the Supreme Court upheld the execution of a search warrant where the executing officers delayed *only* fifteen to twenty seconds after they had knocked on the search target's door and announced their presence.[160] Indeed, Lashawn Banks, who was inside, could not get to the door in time to respond to the knock and announcement, as he was in the shower when the officers pounded on the door.[161] When the officers actually broke his door down and rushed inside, they found Banks heading toward the front door to answer it, half-naked and dripping wet, partially covered by only a towel.[162] In response to Banks' argument that a delay of fifteen to twenty seconds was an insufficient and unconstitutional period of time for an appropriate delay under the knock-and-announce rules the Supreme Court previously held required under the Fourth Amendment,[163] a unanimous Supreme Court demurred.[164]

Writing for the whole Court, Justice Souter observed, once again, that the Fourth Amendment's key prescription is that of "reasonableness."[165] And, in his words,

> [a]lthough the notion of reasonable execution must therefore be fleshed out, we have done that case by case, largely avoiding categories and protocols for searches. Instead, we have

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[159] 124 S. Ct. 521 (2003).
[160] *Banks*, 124 S. Ct. at 523.
[161] *Id.*
[162] *Id.*
[163] *See* Wilson v. Arkansas, 514 U.S. 927 (1995).
[164] *Banks*, 124 S. Ct. at 523.
[165] *Id.*

> treated reasonableness as a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case; it is too hard to invent categories without giving short shrift to details that turn out to be important in a given instance, and without inflating marginal ones. We have, however, pointed out factual considerations of unusual, albeit not dispositive, significance.[166]

It should not surprise you at this point that the sorts of "factual considerations" the Court turned out to be talking about in *Banks* are "practical" and "commonsensical" things like the potential dangers posed to the executing officers by failing to delay, or by failing to delay for a substantial period of time, at the door and/or the reasonable possibility that undertaking such a delay might result in the destruction of evidence. As the Court explained further, "the crucial fact in examining [the] actions [of executing officers] is not [the] time [it would take for an occupant] to reach [and answer] the door but the particular exigency claimed."[167]

Accordingly, the *Banks* Court concluded that

> [o]n the record here, what matters is the opportunity to get rid of cocaine, which a prudent dealer will keep near a commode or kitchen sink. The significant circumstances include the arrival of the police during the day, when anyone inside would probably have been up and around, and the sufficiency of 15 to 20 seconds for getting to the bathroom or the kitchen to start flushing cocaine down the drain. That is, when circumstances are exigent because a pusher may be near the point of putting his drugs beyond reach, it is imminent disposal, not travel time to the entrance, that governs when the police may reasonably enter; since the bathroom and kitchen are usually in the interior of a dwelling, not the front hall, there is no reason generally to peg the travel time to the location of the door, and no reliable basis for giving the proprietor of a mansion a longer wait than the resident of a bungalow, or an apartment like Banks's. And 15 to 20 seconds

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[166] *Id.* at 525 (citations omitted).
[167] *Id.* at 527.

> does not seem an unrealistic guess about the time someone would need to get in a position to rid his quarters of cocaine.[168]

Different facts, a different demonstration of exigency or the lack thereof, would have led to a different result. Justice Souter acknowledged this point readily enough, pointing out, for example, the obvious, namely that "[p]olice [officers] seeking a stolen piano may be able to spend more time to make sure they really need the battering ram."[169] In short, Justice Souter was perspicacious enough to realize that the act of chopping up a stolen piano into slivers small enough to flush down the kitchen disposal or the powder room toilet would take somewhat longer than fifteen to twenty seconds. But, again, the real point of all of this is that the application of the Fourth Amendment depends closely upon the particular context in which it applies, including most particularly the gravity of the situation in which the relevant law enforcement conduct arises.

With these three very recent Supreme Court decisions in mind, let me return once again, and finally, to the question of the Fourth Amendment's application in perilous times, its nature in the face of real or perceived threats of terrorist activity.

If law enforcement authorities reasonably believe that a terrorist act is imminent, bringing explosives onto an airplane in an attempt to hijack it, for example, it would appear to be absolutely clear, bearing in mind, in particular, all of these recent decisions, that the requisite antecedent justification necessary (if any) to undertake law enforcement activity subject to the Fourth Amendment must be assessed with full consideration of that grave and cataclysmic context. Indeed, the *Edmond* Court had previously made clear, albeit in *obiter dictum*, that checkpoint stops that would otherwise be unconstitutional are nonetheless justified in "emergency" situations, including, the Court said expressly, presciently, more than a year *before* the September 11th attack, checkpoints established in

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[168] *Id.*

[169] *Id.* at 528.

response to "an imminent terrorist attack."[170]

We are simply not talking about unfastened seatbelts or littering or smoking or piano thieves or drunk driving any more. The Fourth Amendment should, the Fourth Amendment *must*, be applied, again in the *Pringle* Court's words, "practically," "nontechnically," and in a manner "that deals with 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.'"[171] Our "everyday life" in 2004 includes, most regrettably and tragically, but nonetheless "factually and practically," the specter of devastating acts of terrorist criminality raising the possibility of massive destruction and loss of life. The point is that we *can* apply the Fourth Amendment consistently, objectively, and fairly and *still* recognize the simple truth that some threats are graver than others.

To recognize this plain and common sense fact of life is not, however, to deny that the Fourth Amendment does and should apply to law enforcement search-and-seizure activities directed at everyone—*anyone*—suspected of committing a crime, *any crime*. The Fourth Amendment *does* apply the same to everyone. But, *when* the Fourth Amendment applies and *how* the Fourth Amendment applies, are separate questions the answers to which are, and must remain, extremely sensitive to the circumstances in which particular Fourth Amendment encounters are utilized and the way in which those encounters are made.

This is the point where the competing arguments about the application of Fourth Amendment principles in perilous times come together. The Fourth Amendment applies, it does and it must apply if we are to respect our own laws and our own constitutional history, to *every* search and seizure (including arrests) made by American law enforcement authorities or their agents. But, the Fourth Amendment does and must apply as well in a way that includes unblindered sensitivity to and awareness of the context in which the law enforcement activities in question arise. Indeed, it *must* apply in this way if we

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[170] *Edmond*, 531 U.S. at 44.
[171] *Pringle*, 124 S. Ct. at 799.

are to be able to respond appropriately and effectively to the threats that now imperil us.

As Professor Heymann has reminded us,

> the gravest danger to civil liberties and human rights emerging in the aftermath of September 11 is that leaders will think we are without concern for non-citizens within the United States, indifferent to the welfare of people repressed by despotic governments, prepared to accept without question unequal treatment based on ethnicity, and unable or unwilling to see that there must be trade-offs even among our own freedoms. An American people encouraged to earn the respect for our traditions and values will be left with very hard choices. That is inevitable. But we should seek to make those choices proudly and intelligently, and not out of fear and anger alone.[172]

The current wave of terrorist threats to the United States and to Americans and our allies is real; it is neither hypothetical nor imagined. The extraordinary scope of the potential disasters portended by some of these threats is also real; it is neither hypothetical nor imagined. In the course of the entire American Revolution, 4435 Americans lost their lives. But in one single terrorist attack, the attack on September 11, 2001, more than 3000 individuals, Americans *and* citizens of other countries, lost their lives in that one attack alone. When one recognizes that terrorist individuals and organizations undoubtedly seek to obtain chemical, biological and nuclear materials to assist in their assaults, the possibilities for even more dramatic loss of life are, of course, staggering and horrific. These grave threats to us and to our nation and to our national identity and character are, sad to say, not likely to diminish any time soon.[173]

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[172] HEYMANN, *supra* note 53, at 113.

[173] The deaths of Osama bin Laden, and the next leader who takes his place—and the next, and the next—and their followers, and the detentions of hundreds or thousands of additional individuals who are merely suspected of complicity will hardly diminish, let alone resolve, the root causes of terrorism. *Cf.* HEYMANN, *supra* note 53, at xiii ("Terrorism is almost always the tactic of those who feel powerless or purposely disempowered. Actions that restrain their dangerous activities are likely to increase their resentment at powerlessness or repres-

Our response to such dire and dramatic threats should not be, our response *cannot be*, to ignore our own history, to ignore our own laws, or to ignore our own constitutional principles. What sense does it make to jettison our Constitution in order to preserve it, to ignore our own laws to uphold them, or to abandon our integrity in order to save it? As the Supreme Court opined in 1967, "[i]t would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile."[174] Justice Stevens has more recently, sensibly declaimed, "if this Nation is to remain true to the ideals symbolized by its flag, it must not wield the tools of tyrants even to resist an assault by the forces of tyranny."[175]

Justice O'Connor made virtually this same point at greater length in her recent plurality opinion in *Hamdi v. Rumsfeld*, handed down in June of 2004, wherein the Court made it clear that due process requires that American citizens designated "enemy combatants" by the Executive Branch nonetheless retain their constitutional rights to a meaningful opportunity to contest the factual basis for their detention:

> Striking the proper constitutional balance here is of great importance to the Nation during this period of ongoing combat. But it is equally vital that our calculus not give short shrift to the values that this country holds dear or to the privilege that is American citizenship. It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.[176]

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sion. Assassinating a terrorist leader may weaken management but, by creating a martyr, help recruitment."). Muslim fundamentalists are not, of course, the only groups who pose such a terrorist threat to Americans and American interests.

[174] United States v. Robel, 389 U.S. 258, 264 (1967).

[175] Rumsfeld v. Padilla, 124 S. Ct. 2711, 2735 (2004) (Stevens, J., dissenting).

[176] Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2648 (2004).

> The imperative necessity for safeguarding these rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with fundamental constitutional guarantees which, it is feared, will inhibit government action.

Justice Scalia has similarly weighed in, underscoring the point that the Framers of the Constitution well understood the need to keep our constitutional balance true, even *in extremis*:

> The Founders well understood the difficult tradeoff between safety and freedom. "Safety from external danger," Hamilton declared,
>
> "is the most powerful director of national conduct. Even the ardent love of liberty will, after a time, give way to its dictates. The violent destruction of life and property incident to war; the continual effort and alarm attendant on a state of continual danger, will compel nations the most attached to liberty, to resort for repose and security to institutions which have a tendency to destroy their civil and political rights. To be more safe, they, at length, become willing to run the risk of being less free."
>
> The Founders warned us about the risk, and equipped us with a Constitution designed to deal with it.
>
> Many think it not only inevitable but entirely proper that liberty give way to security in times of national crisis—that, at the extremes of military exigency, *inter arma silent leges*. Whatever the general merits of the view that war silences law or modulates its voice, that view has no place in the interpretation and application of a Constitution designed precisely to confront war and, in a manner that accords with democratic principles, to accommodate it.[177]

The burden of upholding our Constitutional principles, our laws and our liberties falls most heavily, of course, upon the shoulders of our judiciary. It is rarely, if ever, the "popular" thing to do to release a putative criminal, terrorist or piano thief, even when the law commands it. But, as Judge Stephen Reinhardt of the Ninth Circuit Court of Appeals recently concluded for that court, "even in times of national emergency—indeed, particularly in such times—it is the obligation of the Judicial Branch to ensure the preservation of our constitu-

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Kennedy v. Mendoza-Martinez, 372 U.S. 144, 165 (1963).

[177] *Hamdi*, 124 S. Ct. at 2674 (Scalia, J., dissenting) (citation omitted).

tional values and to prevent the Executive Branch from running roughshod over the rights of citizens and aliens alike."[178]

This must be true for judges even if the cost of taking such positions is not simply unpopularity, but more significant personal and professional costs as well. As James Otis remarked of the calumny he faced when he resigned from public office to take up the writs-of-assistance case for the Massachusetts Bay colonists, "[t]he only principles of public conduct that are worthy [of] a gentleman . . . are, to sacrifice estate, ease, health and applause, and even life itself to the sacred calls of his country. These manly sentiments in private life make the good citizen, in public life, the patriot and the hero."[179] Of course, today, we recognize that such courageous virtues as those described by Otis are not solely the characteristics of loyal and conscientious conduct by "gentlemen," lawyers and judges of only one gender.

As former Chief Judge Patricia Wald of the District of Columbia Circuit Court of Appeals, a "gentlewoman" who has also served her country as a Judge of the International Criminal Tribunal for the Former Yugoslavia at The Hague, made the point a number of years ago,

> [w]e do not believe that strict enforcement of the fourth amendment will cripple the police or preclude effective law enforcement. Candor compels us to acknowledge, however, that some crimes escape detection, and some criminals escape punishment, as a result of our vigilant commitment to constitutional norms. Enforcement of these norms is not, on such occasions, a pleasant duty; *but it is a duty from which judges may not shrink.*[180]

As odd and discomfiting as it may be to hear it said like this, it is nonetheless true that our American values are upheld and our constitutional history is reaffirmed each and every time a possibly guilty person is set free because evidence establishing his or her guilt was suppressed by a court seeking to insure

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[178] Gherebi v. Bush, 379 F.3d 727, 730 (9th Cir. 2004).

[179] SMITH, *supra* note 19, at 316.

[180] United States v. Most, 876 F.2d 191, 201 (D.C. Cir. 1989) (emphasis added).

that our Government and its agents respect and follow our laws and our basic constitutional principles.

Professor Heymann counsels that "the challenge is not to beat and stop terrorism. The trick is to do it in a way most consistent with the values of a democratic society."[181] To do that, we need the courage out of convictions, a courage not unlike that demonstrated by the young James Otis, a "flame of fire" when he took on the establishment and sought to protect and to vindicate our forefathers' and foremothers' basic human rights by arguing against the writs of assistance.[182]

At the same time, if less grandly, we need from our judges, *and from our leaders*, we need more just-plain-good-old common sense. We need the common sense to realize the enormity of the threats that face us, and we need the wisdom *not* to respond to these threats in a partisan fashion or simply with grand-sounding rhetoric, beautiful to the ear but insensitive to the realities (and the strategic nuances) of the dangers that we face. We need the wisdom and the common sense *not* to ignore these threats when there is neither cause nor doctrinal obligation to ignore them, but while, *simultaneously*, preserving our Fourth Amendment values and heritage.

Such a balancing act is, of course, a tricky one, and sometimes there will be elements of risk involved as well. But, fortunately, *most* criminal cases involving law enforcement officers' Fourth Amendment activity do not involve terrorists. They do not, thankfully, involve airplane highjackings or genocide or *jihad* or suicide bombers. The corollary of a Fourth Amendment reasonableness doctrine that permits us to consider the horror and enormity of such crimes in assessing, for example, the presence of probable cause to arrest or search as in *Pringle*, or the power to make suspicionless checkpoint encounters as in *Lidster,* or the amount of time necessary to delay after knocking and announcing with a warrant as in *Banks*, is that lawyers and judges (and policy-makers) must continue to respect the value of preserving Fourth Amendment rights and our constitutional traditions, even when it is painful to do so, even

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[181] *See* HEYMANN, *supra* note 53, at 159.

[182] SMITH, *supra* note 19, at 316.

when it hampers some overzealous activities undertaken by law enforcement officers, actions that were genuinely and sincerely intended to fight crime . . . and terrorism.

We *can* do this. We *can* respect individual rights and we *can* protect ourselves, at the very same time, from the awful threats that now face us.

Indeed, not only *can* we do this, it is, as Americans, just precisely what we *must* do. We must keep the balance true, we must keep the constitutional fire aflame even, *perhaps especially*, in perilous times.

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